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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-9041

BRUNSWICK CORPORATION,

Petitioner,

v.

PUEBLO BOWL-O-MAT, INC, BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—

Brunswick Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 29, 1975.[1]

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1. The respondents herein have also filed a petition for a writ of certiorari from that same judgment. See **Treadway Companies, Inc. et al. v. Brunswick Corporation,** October Term 1975, No. 75-770.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (App. *infra*, pp. 1a-32a) is reported at 523 F. 2d 262. The opinions of the United States District Court for the District of New Jersey (App. *infra*, pp. 33a-60a) are reported at 364 F. Supp. 316 (D. N. J. 1973) and 389 F. Supp. 996 (D. N. J. 1974).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 29, 1975. On November 5, 1975, Mr. Justice Brennan extended petitioner's time for filing a petition for writ of certiorari to and including December 27, 1975 (No. A-421).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Jurisdiction in the District Court was based on 15 U. S. C. §§ 15 and 26.

QUESTIONS PRESENTED.

In the words of the Court of Appeals, this is a case "of first impression nationally," explores "largely virgin antitrust territory," and "obviously has far-reaching ramifications" (App. *infra*, pp. 6a, 7a, 19a). It presents an unprecedented situation in which the Court of Appeals held that respondents had adduced sufficient evidence to get to the jury on a claim that petitioner's "acquisitions" of local bowling centers as a means of protecting its security interest in defaulted properties, violated Section 7 of the Clayton Act and caused "injury" to respondents (operators of competing centers), notwithstanding that the "acquisitions" were from companies engaged solely in the operation of intrastate enterprises, that the "acquisition" and operation of the bowling centers by petitioner did not result in any lessening of competition or monopoly, that respondents were seeking to recover for "injuries" resulting from the mere continued presence in the market of the "acquired" centers, and that the entire damage case was based on the premise that the "acquired" centers would have failed and gone out of business had the "acquisitions" not occurred. The questions presented are:

1. Does the mere continued presence in certain local markets of retail establishments allegedly "acquired" by a "deep pocket" manufacturer in violation of Section 7 of the Clayton Act afford a basis for competing retailers to recover damages under Section 4 of the Clayton Act when there is no proof that the "acquisitions" resulted in any lessening of competition or monopoly in those markets?

2. Does not the "failing company" principle require dismissal of a treble-damage action based on alleged violations of Section 7 of the Clayton Act where the plaintiffs'

entire damage theory is based on the premise that the "acquired" businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged "acquisitions"?

3. Where a private plaintiff fails to prove that the "acquired" companies were engaged in interstate commerce and that the challenged "acquisitions" had an effect on interstate commerce, is it not incumbent on a reviewing court to dismiss the claim that the "acquisitions" violated Section 7 of the Clayton Act?

STATUTES INVOLVED.

Section 2 of the Sherman Act, 15 U. S. C. § 2, provides

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The first paragraph of Section 7 of the Clayton Act, 15 U. S. C. § 18, provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT.

This petition seeks review of a decision of the United States Court of Appeals for the Third Circuit upholding treble-damage claims premised on alleged violations of Section 7 of the Clayton Act. This is the first case in which a private plaintiff has ever been awarded "damages" for a claimed violation of Section 7 and it presents for decision critical questions of fundamental antitrust policy involving the meaning of Section 7 and the extent to which an alleged violation of that section may furnish a basis for a claim for money damages under Section 4 of the Clayton Act.

These significant antitrust issues arise in the framework of the recreational bowling industry. Petitioner was one of the two major American manufacturers of bowling equipment. Respondents are three subsidiaries of Treadway Companies, Inc. which, through its subsidiaries, operates a number of bowling centers throughout the United States (109a-112a).[2] Respondents operate bowling centers in Pueblo, Colorado; Paramus, New Jersey; and near Poughkeepsie, New York.

In the past twenty years, the industry has experienced a period of marked prosperity (the latter 1950's), then a period of serious decline (the 1960's), and more recently a period of general improvement (the 1970's).

The industry was in its infancy until the introduction of automatic pinsetting machines in the mid 1950's. This

2. This action was instituted by Treadway Companies, Inc. (formerly known as "National Bowl-O-Mat Corporation") and ten of its wholly-owned subsidiaries. Respondents were the only plaintiffs in whose favor a judgment was rendered (68a-72a, 104a-105a).

Record references herein are to the appendix in the court of appeals.

equipment revolutionized the industry and bowling increased in popularity. Local bowling centers thrived and new bowling centers sprang up everywhere. During this growth period petitioner sold large quantities of automatic pinsetters and bowling lanes to operators of local bowling centers (866a-868a, 1563a-1573a).[3]

However, because the initial outfitting of a bowling center involves a substantial capital investment, petitioner could not sell its equipment for cash but, instead, sold it for commercial paper, much of which eventually turned out to be worth a great deal less than face value. Petitioner sold its pinsetters and lanes to bowling center operators by means of conditional sales agreements under which the purchaser made a down payment and agreed to pay the balance of the purchase price in installments over a period of years, with petitioner retaining a security interest in the equipment. While petitioner had no difficulty collecting the installment payments during the boom period of the 1950's, the early 1960's brought about a complete reversal. The bowling industry went into a sharp decline and petitioner ran into a nightmare of collection problems (1569a-1584a). The Court of Appeals, in its opinion below, accurately summarizes the situation as follows (App. *infra*, pp. 7a-8a):

> "Simultaneously with the decline in the industry there occurred a collection problem. Defaults on equipment loans became commonplace. Numerous bowling center proprietors were in such hopeless financial straits that it became clear that there was no reasonable prospect of payment. Exercising its chattel security rights, Brunswick made numerous reposses-

3. Since 1963, there have been very few sales of new bowling equipment due to the availability of large quantities of used equipment (1574a-1575a, 2666a).

sions, and attempted to dispose of the repossessed equipment at discount prices. Such sales, however, did not keep pace with repossessions. Brunswick's efforts to lease repossessed lanes to new independent proprietors proved unsuccessful. Over the years Brunswick had borrowed close to $300 million in order to finance the manufacture and sale of bowling equipment. By late 1964 its receivables were in excess of $400 million of which more than $100 million dollars were over 90 days delinquent. Brunswick was clearly in serious financial difficulty.

"In an effort to reverse its deteriorating condition, Brunswick's management decided on a plan. In those cases in which attempts to collect receivables failed, it would repossess the equipment and attempt to sell it in place to third parties. If no sale could be effected Brunswick would then consider operating the failing centers itself if there appeared to be any reasonable prospect that a positive cash flow would result.

"In January 1965 Brunswick formed a Bowling Center Operations Division (BCOD) charged with the responsibility of evaluating centers and operating those which could produce a positive cash flow. This development was disclosed by Brunswick's president to a meeting of the Bowling Proprietors Association, a retail level trade group, in 1965.

"Between 1965 and 1972 BCOD evaluated over 600 defaulting centers for possible operation, commenced operating 222 of these, disposed of 11 to third parties, and closed 43 which proved unable to develop a positive cash flow. The highest number operated by Brunswick at any one time was 169. The largest

number of centers taken over by Brunswick for operation in any year was 124 in 1965. Of these, centers in three areas are the subject of this appeal. They are Dutchess Lanes in Poughkeepsie, New York, Belmont Lanes in Pueblo, Colorado, and Fair Lawn Lanes, Interstate Lanes, Ten-Pin-on-the-Mall and Lodi Lanes in or near Paramus, New Jersey.

"In each of the local retail market areas a Treadway subsidiary operated a bowling center competing for retail customers with the bowling centers taken over by Brunswick. . . ."

In 1965, petitioner repossessed the pinsetters and lanes at a defaulting bowling center (Dutchess Lanes) in Poughkeepsie, New York, and began operating that center. Under petitioner's operation, Dutchess Lanes failed to develop a positive cash flow and petitioner discontinued that operation in 1969, removing its bowling equipment. At the time petitioner commenced operating Dutchess Lanes in 1965, there were five other bowling centers in the Poughkeepsie area including one operated by respondent, Holiday Bowl-O-Mat, Inc. Each of the five centers continued to operate throughout the period of petitioner's operation of Dutchess Lanes and were still operating at the time of trial (296a-301a, 316a-317a, 597a, 666a-667a, 672a-673a, 1646a, 1723a-1724a).

Petitioner also repossessed the bowling equipment at a defaulting bowling center in Pueblo, Colorado (Belmont Lanes) and began operating that center in 1965. There were four centers in Pueblo, Colorado operated by others at the time, including one operated by respondent Pueblo Bowl-O-Mat, Inc. Each of these centers continued to

operate throughout the period involved in this case (203a, 264a, 692a, 772a-774a, 1646a).

Also in 1965, petitioner was confronted by defaults in equipment payments by the bankrupt American International Bowling Corporation ("AIBC") and its subsidiaries (each of which operated a local bowling center). AIBC and its subsidiaries owed in excess of $10 million to petitioner and petitioner purchased the capital stock of a number of AIBC subsidiaries at the AIBC bankruptcy sale. Included among the AIBC subsidiaries whose stock was purchased by petitioner were two companies operating bowling centers in the general vicinity of Paramus, New Jersey—Fair Lawn Lanes in Fair Lawn, New Jersey and Interstate Lanes in Ramsey, New Jersey. Petitioner began operating these two bowling centers in March 1965 (389a-392a, 1988a, 2048a).

Later, petitioner operated two other bowling centers in that general area. In September 1969, petitioner repossessed the bowling equipment at Ten-Pin-on-the-Mall in Paramus, New Jersey and took over the operations of that bowling center. Beginning in 1970, petitioner operated Lodi Lanes in Lodi, New Jersey under a lease arrangement which expired in 1973 (1728a-1729a).

Respondent Bowl-O-Mat Paramus Operations is the operator of a bowling center in Paramus, New Jersey which was said to be in competition with all four of these centers—Fair Lawn, Interstate, Ten-Pin and Lodi—as well as with a number of other bowling centers in the northern New Jersey area (329a-335a, 2438a).

Claiming that petitioner's taking over and continuing the operation of bowling centers violated Section 2 of the Sherman Act ("monopolization" and "attempt to monopolize") and Section 7 of the Clayton Act ("acquisitions" whose effect "may be substantially to lessen competition, or to tend to create a monopoly"), respondents (and their parent and sister corporations) brought suit against petitioner seeking money damages (under Section 4 of the Clayton Act) and equitable relief (under Section 16 of the Clayton Act).[4] A lengthy jury trial ensued in the United States District Court for the District of New Jersey.

There was no evidence whatever at the trial that competition among bowling centers in the Poughkeepsie, Pueblo and Paramus areas was lessened in any degree (let alone "substantially") by reason of petitioner's taking over or operating any bowling center, nor was there any showing that any of the centers achieved a greater share of the bowling patronage in its market after petitioner began operating it than the center had under its prior operator. As the Court of Appeals pointed out, petitioner's "entry into the picture did not increase concentration, but only acted as a substitution of competitors" (App. *infra*, p. 22a). Throughout the trial respondents took the position that petitioner had violated the law in taking over the centers and keeping them in business, that each of the respondents (as a competitor of one of the centers) was "injured" by the mere continued presence in the market of the center operated by petitioner, and that, therefore, respondents were entitled to recover as "damages" the difference between what their bowling centers actually earned and what

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4. The lawsuit filed by respondents is in contrast with the decision of the Government. Shortly after petitioner's entry into the business of operating bowling centers, the Federal Trade Commission commenced an investigation into petitioner's alleged antitrust violations in this field. The Commission concluded the investigation in 1968, sending petitioner two "no action" letters (43b-52b).

those centers would have earned had the "acquired"[5] centers failed and disappeared from the market (551a-552a, 566a, 580a-583a, 595a-610a, 673a, 785a, 889a-890a, 899a-900a).

At the conclusion of the trial, the jury returned verdicts (2384a-2385a) finding **for**[6] petitioner on the claims of monopolization and attempted monopolization under Section 2 of the Sherman Act, and **against** petitioner on the claims under Section 7 of the Clayton Act. The jury awarded damages to respondents in amounts equal to the additional revenues and profits that respondents' witnesses estimated respondents' bowling centers would have earned over the years if the "acquired" centers had gone out of

5. It is not at all clear that petitioner had "acquired" any of these centers within the meaning of Section 7 of the Clayton Act. Petitioner entered two of the three markets involved in this case (Poughkeepsie and Pueblo) not by purchasing the stock or assets of an existing business enterprise but by exercising its rights as a secured creditor—repossessing, after continuous defaults, assets in which it had an existing security interest. There is nothing in the legislative history of Section 7 of the Clayton Act which suggests that the section was intended to cover a secured creditor's exercise of its right to recover equipment upon default in equipment payments by the debtor.

Petitioner entered the third market (Paramus) by purchasing at a bankruptcy sale the capital stock of two bowling centers which also had defaulted in equipment payments. The legislative history of the 1950 amendments to Section 7 of the Clayton Act demonstrates that Section 7 does not apply to purchases made at bankruptcy sales. See H. R. Rep. No. 1191, 81st Cong., 1st Sess. at p. 6 (1949):

> "The argument that a corporation in bankruptcy or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases."

See also S. Rep. No. 1775, 81st Cong., 2d Sess. at p. 7 (1950) to the same effect.

6. Wherever boldface is used in this petition, the emphasis is ours.

existence on the day petitioner commenced operating them (2549a).

After its motion for judgments notwithstanding the verdict and, in the alternative, for a new trial was denied (73a-86a; App. *infra*, pp. 33a-49a), petitioner appealed to the United States Court of Appeals for the Third Circuit. In an opinion with far-ranging implications, the Court of Appeals ordered a new trial (holding that the case had been submitted to the jury on erroneous instructions as to both liability and damages) but refused to order the entry of judgment for petitioner as a matter of law (App. *infra*, pp. 1a-32a).

The Court of Appeals held that a properly-instructed jury could find that petitioner had violated Section 7, notwithstanding the fact (established by the jury's Section 2 verdict) that petitioner had neither monopolized nor attempted to monopolize the business of operating bowling centers (either nationally or in the three local markets) and notwithstanding the absence of any showing that there had been a lessening of competition. According to the Court of Appeals: "This case involves a 'deep pocket' manufacturer's decision to integrate vertically forward into local retail markets and to compete with smaller competitors having shallower pockets" (App. *infra*, p. 9a), "in some industries the acquisition of a competitor by a deep pocket parent can have sufficient potential to harm horizontal competitors so as to violate § 7" (App. *infra*, p. 14a), and "there was sufficient evidence of such potential here to submit the case to the jury on the issue of effect on competitors" (App. *infra*, p. 14a).[7]

7. In making these generalizations, the Court of Appeals lost sight of two very salient facts. In the first place, this was not a situation where a large company took a substantial amount of new money and invested it in a planned expansion; petitioner was forced into the business of operating bowling centers in order to

The Court of Appeals also held that respondents could get their damage claim to the jury even though they had not shown any lessening of competition or monopoly, the two evils that Section 7 of the Clayton Act was designed to prevent. According to the Court of Appeals, "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, **whether or not that injury flows from or results in an actual lessening of competition"** (App. *infra*, p. 19a).

Additionally, the Court of Appeals held that respondents had adduced sufficient evidence of "damages" to get their case to the jury even though their entire damage theory was based on a premise inconsistent with a finding that Section 7 of the Clayton Act had been violated, to wit the supposition that, had it not been for petitioner's "acquisitions," the bowling centers involved in this case would have failed and gone out of business (App. *infra*, pp. 26a-27a).

Finally, the Court of Appeals held that, although Section 7 comes into play only when a corporation "engaged in commerce" acquires stock or assets from another corporation "engaged also in commerce," and although it

7. (Cont'd.)

salvage something from its defaulted equipment receivables and to protect its remaining receivables which were not in default. As the Court of Appeals noted earlier in its opinion, petitioner only operated centers where "no sale could be effected" to third parties and where there was a "reasonable prospect that a positive cash flow would result" (App. *infra*, p. 8a), *i.e.*, that cash would flow **from the center to petitioner,** not the other way around.

Secondly, as the Court of Appeals had also noted earlier in its opinion, petitioner "was clearly in serious financial difficulty" (App. *infra*, p. 8a). Thus, while petitioner's pockets may have been "deep," they were nearly empty. Petitioner was itself in danger of bankruptcy (2112a-2114a).

would appear that respondents had failed to adduce sufficient evidence concerning the business of the predecessor operators of the "acquired" centers to meet this jurisdictional threshold, the Court would not order dismissal of the case but would, instead, require relitigation of the "in commerce" question "with the plaintiffs being given an opportunity to satisfy the new and more stringent jurisdictional test" set forth in this Court's recent decision in **United States v. American Building Maintenance Industries,** 422 U. S. 271 (1975) (App. *infra*, p. 16a).

REASONS FOR GRANTING THE WRIT.

I.

The Holding of the Court of Appeals for the Third Circuit that a Retail Establishment Can Recover for "Injuries" Attributable to the Mere Continued Presence in the Market of a Competing Retail Establishment Allegedly Acquired in Violation of Section 7 of the Clayton Act Without Proof of Any Lessening of Competition or Monopoly, Presents a Far Reaching Question of Fundamental Antitrust Policy Which Should Be Resolved by This Court.

As the Court of Appeals made clear, this case presents for decision important questions of fundamental antitrust policy which have not heretofore been decided by this Court, foremost among which is a novel and radical theory as to when Section 7 of the Clayton Act may furnish a basis for a claim for money damages under Section 4 of that Act.

As the Court of Appeals put it, "the antitrust questions arise because of the unique interaction among the Clayton Act § 7 . . . and the private remedy provisions of § 4 and § 16 of the same act" (App. *infra,* p. 6a).

Section 4, 15 U. S. C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4 typically is applied in private actions brought to recover damages for alleged violations of Sec-

tions 1 and 2 of the Sherman Act. Since Section 1 of the Sherman Act, 15 U. S. C. § 1, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce", one who has been injured in his business or property by reason of such a restraint has a claim for damages under Section 4 of the Clayton Act. Similarly, since Section 2 of the Sherman Act, 15 U. S. C. § 2, makes it unlawful for anyone to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce," Section 4 of the Clayton Act permits one who has been injured by a monopolization or attempted monopolization to sue for the damages he has sustained.

Section 7 of the Clayton Act, 15 U. S. C. § 18, stands on a different footing. As the Court of Appeals recognized, Section 7 is "a statutory prohibition aimed neither at existing conspiracies nor restraints, nor at existing or attempted monopolizations, but at incipient tendencies" (App. *infra,* p. 6a). Section 7 provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or . . . assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

This Court has pointed out on a number of occasions that the purpose of Section 7 is preventative in nature. Section 7 "was intended to arrest the anticompetitive effects of market power in their incipiency"; [8] "to arrest apprehended consequences of intercorporate relationships

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8. **FTC v. Procter & Gamble Co.,** 386 U. S. 568, 577 (1967).

before those relationships could work their evil." [9] Courts were given power "to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." [10] Congress' "concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition." [11] The design of Section 7 was to stop the harm before it occurred. "Mergers with a probable anticompetitive effect were to be proscribed by this Act." [12] "The test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." [13]

Because Section 7 proscribes acquisitions which "may" lead to specified anticompetitive consequences while Section 4 permits recovery by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," there is a fundamental incongruity in basing a Section 4 action on a Section 7 violation. While "a reasonable probability" may or may not ripen into a future actuality, how can it cause injury before it ripens? How can one "be injured in his business or property by reason of" a restraint of trade that is only threatened or potential? Unable to find a satisfactory answer to these questions, a number of federal district courts held in the 1960's that a private plaintiff could not predicate a Section 4 claim for money damages on a violation of Section 7. See **Gottesman v. General**

9. **United States v. E. I. duPont deNemours & Co.**, 353 U. S. 586, 597 (1957).

10. **Brown Shoe Co. v. United States**, 370 U. S. 294, 323 n. 39 (1962) (quoting from the legislative history).

11. *Id.* at 323.

12. *Ibid.*

13. **United States v. E. I. duPont deNemours & Co.**, 353 U. S. at 607.

Motors Corporation, 221 F. Supp. 488, 493 (S. D. N. Y. 1963); **Highland Supply Corp. v. Reynolds Metals Co.**, 245 F. Supp. 510, 512-514 (E. D. Mo. 1965); **Bailey's Bakery, Ltd. v. Continental Baking Co.**, 235 F. Supp. 705, 716-717 (D. Hawaii 1964), *aff'd per curiam* 401 F. 2d 182 (9th Cir. 1968), *cert. denied* 393 U. S. 1086 (1969); **Isidor Weinstein Investment Co. v. Hearst Corp.**, 303 F. Supp. 646, 650 (N. D. Cal. 1969).

In **Gottesman v. General Motors Corporation**, 414 F. 2d 956, 961 (2d Cir. 1969), the Court of Appeals for the Second Circuit took a different approach. In that case, a General Motors stockholder brought a derivative action against duPont as an aftermath of the Government case in which this Court had held that duPont's acquisition of a substantial stock ownership in General Motors constituted a "potential" restraint of trade. **United States v. E. I. duPont deNemours & Co.**, 353 U. S. 586 (1957). The stockholder claimed that, because of the stock ownership, duPont had caused General Motors to purchase paints and fabrics from duPont at higher prices than could have been obtained from other sources. In a pretrial ruling, the district court dismissed the claim holding that there could be no private damage recovery for a Section 7 violation (221 F. Supp. 488) but the court of appeals reversed and remanded, saying (414 F. 2d at 961):

> ". . . The basis of the pretrial ruling was that a section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. If section 7 is designed to prevent acquisitions that 'may' or 'tend to' cause specified harm, such an acquisition may either itself directly bring about the harm or make possible acts that do.

> We do not say that a section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury 'by reason of' the violation are persuasive propositions. . . ." [14]

The availability of damages "if the threat ripens into reality" obviously means if the threatened injury to competition becomes actual, and not merely potential or incipient.

Subsequent to the **Gottesman** decision, a number of district courts reached the same conclusion.[15] So have the courts of appeals for the Fifth and Eighth Circuits. **Dailey v. Quality School Plan, Inc.**, 380 F. 2d 484, 488 (5th Cir. 1967);[16] **Carlson Companies, Inc. v. Sperry and Hutchinson Co.**, 507 F. 2d 959 (8th Cir. 1974).[17]

14. On remand in **Gottesman**, the district court held that the plaintiff failed to sustain her burden of proving damages resulting from the Section 7 violation, and the court of appeals affirmed. **Gottesman v. General Motors Corporation**, 310 F. Supp. 1257 (S. D. N. Y. 1970), *aff'd* 463 F. 2d 1205 (2d Cir.), *cert. denied* 403 U. S. 911 (1971).

15. **Metropolitan Liquor Co. v. Heublein, Inc.**, 305 F. Supp. 946 (E. D. Wis. 1969); **Western Geophysical Co. v. Bolt Assoc., Inc.**, 305 F. Supp. 1251 (D. Conn. 1969); **Kirihara v. Bendix Corp.**, 306 F. Supp. 72 (D. Hawaii 1969); **Isidor Weinstein Investment Co. v. Hearst Corp.**, 310 F. Supp. 390 (N. D. Cal. 1970); **Metric Hosiery Co. v. Spartans Industries, Inc.**, 50 F. R. D. 50 (S. D. N. Y. 1970); **Champion Spark Plug Co. v. Ransburg Electro-Coating Corp.**, 1971 Trade Cases ¶ 73,553 (N. D. Ohio 1971); **Calnetics Corp. v. Volkswagen of America, Inc.**, 348 F. Supp. 606 (C. D. Cal. 1972); **Peltier v. Humble Oil & Refining Co.**, 1973 Trade Cases ¶ 74,278 (D. Ore. 1972); **Zenith Vinyl Fabrics Corp. v. Ford Motor Co.**, 375 F. Supp. 133 (E. D. Mich. 1973); **Heatransfer Corp. v. Volkswagenwerk A. G.**, 1975 Trade Cases ¶ 60,307 (S. D. Texas 1974).

16. On remand in the **Dailey** case, a jury found for the defendant and the court of appeals affirmed. **Dailey v. Quality School Plan, Inc.**, 427 F. 2d 1080 (5th Cir. 1970).

17. See also **Martin-Trigona v. Federal Reserve Board**, 509 F. 2d 363, 366 n. 12 (D. C. Cir. 1975) (dictum).

In the instant case, however, the Court of Appeals for the Third Circuit went far beyond the **Gottesman** rule and, in effect, rejected the cornerstone of the **Gottesman** reasoning by holding that the mere continued presence in the market of a company allegedly "acquired" in violation of Section 7 may provide a basis for a competitor to recover damages under Section 4 in spite of the absence of proof that the anticompetitive effects supposedly threatened by the "acquisition" had ripened into reality.

While the Court of Appeals for the Second Circuit held in **Gottesman** that recovery may be had in appropriate circumstances for a violation of Section 7, it specifically pointed out that private plaintiffs "cannot rest on a showing of a violation of section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation." 414 F. 2d at 961. In **Dailey**, the Court of Appeals for the Fifth Circuit emphasized that "it is incumbent upon a plaintiff to allege and prove that he has been 'injured in his business or property' by acts of the defendant which are forbidden by the antitrust laws." 380 F. 2d at 487. And in **Carlson** the Court of Appeals for the Eighth Circuit stressed that "to support a private action a plaintiff must show more than the possibility of harm; he must demonstrate some private harm to himself." 507 F. 2d at 961. "Recovery for a violation as alleged in plaintiff's complaint must rest on proof of actual damage." *Id.* at 962. And "it is only anti-competitive injury which § 7 was intended to eliminate." *Ibid.*

Since, even under **Gottesman, Dailey** and **Carlson**, one cannot sustain damages from a mere probability and since Section 4 of the Clayton Act permits recovery only for damages sustained "by reason of anything forbidden in the antitrust laws," it would seem to be axiomatic that if a private action for damages for violation of Section 7 is to

be allowed, the "injury" that must be shown is injury flowing from that which Section 7 was designed to protect against, *i.e.*, an actual lessening of competition or a monopoly. Numerous Section 7 cases have recognized this principle. See, for example:

> **Peterson v. Borden Co.**, 50 F. 2d 644, 646 (7th Cir. 1931) ("the right of action given to persons injured through the resultant tendency to substantial lessening of competition or creation of monopoly would include such injury only as such tendency to lessen competition or to create monopoly engendered").
>
> **GAF Corp. v. Circle Floor Co., Inc.**, 463 F. 2d 752, 759 (2d Cir. 1972), *cert. dismissed* 413 U. S. 901 (1973) ("only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action").
>
> **Reibert v. Atlantic Richfield Co.**, 471 F. 2d 727, 731 (10th Cir.), *cert. denied* 411 U. S. 938 (1973) ("The first element [of proximate cause], causal connection between violation and injury, is lacking because appellant cannot show that any antitrust violations directly injured him. He has suffered no direct injury as a result of the prohibited lessening of competition").
>
> **Rayco Mfg. Co. v. Dunn**, 234 F. Supp. 593, 597 (N. D. Ill. 1964) ("the injury must result from the lessened competition or monopoly itself").
>
> **Pandola v. Texaco, Inc.**, 1975 Trade Cases ¶ 60,232 at p. 65,931 (C. D. Cal. 1975) ("a private litigant must demonstrate not only that its injury is causally related to the challenged acquisition, but also that its claimed injury results directly from the specific anticompetitive consequences proscribed by Section 7 itself, *i.e.*, 'lessened competition or monopoly itself'").

Perhaps the best statement of the principle is contained in **Dole Valve Co. v. Perfection Bar Equipment, Inc.**, 311 F. Supp. 459, 462 (N. D. Ill. 1970), where the court said:

> "To recover damages under Section 7 of the Clayton Act, a complainant must be able to show that he 'suffered some special damage to his business as a direct and proximate result of the acquisition. • • • the injury must result from the lessened competition or monopoly itself.' . . . Proof that a competitor made sales after it was unlawfully acquired by another, even if the complainant competed for those sales, is not evidence that the sales were the 'direct and proximate result' of the unlawful acquisition. If such were the rule, corporations violating Section 7 would become insurers of the commercial success of their competitors. This is not the law."

In a most extreme extension of the concept that a Section 7 violation may give rise to a claim for money damages under Section 4, the Court of Appeals for the Third Circuit has held in the instant case that a competitor of the "acquired" company need **not** show injury resulting from a lessening of competition or monopoly. Rather, according to the Third Circuit, the competitor may recover damages under Section 4 merely by showing "injury in fact causally related to the violator's presence in the market, **whether or not** that injury flows from or results in an actual lessening of competition" (App. *infra*, p. 19a). The court permits

this to occur on the unprecedented theory that "illegal presence which causes injury to the business or property of a competitor is compensable under § 4." (*Ibid.*).

As indicated, no case has ever gone this far. To the contrary, the principles espoused by the Third Circuit are a complete emasculation of the views of the Second Circuit in **Gottesman** and **GAF**, the Fifth Circuit in **Dailey**, the Seventh Circuit in **Petersen**, the Eighth Circuit in **Carlson**, the Tenth Circuit in **Reibert**, and the various district courts which have dealt with the question. The cases indicating that damage recovery may be had in appropriate circumstances for a Section 7 violation proceed on the premise that the harm for which there may be such recovery must be harm that flows from the lessened competition or monopoly that Section 7 was designed to prevent.[18]

The Third Circuit has itself recognized that its "interpretation of the interaction between § 7 and § 4 obviously has far-reaching ramifications" (App. *infra*, p. 19a). The reach may be even greater than the court imagines. For since "this is perhaps the first case in which an award of money damages has been made to a private plaintiff for an alleged violation of § 7" (App. *infra*, pp. 6a-7a), the court's ruling may—indeed, almost inevitably will—serve as the lodestar for rulings in other Section 7 damage cases throughout the country. Since Section 7 requires proof only that there is a reasonable probability that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," it is not at all

18. In addition to the cases cited in the text, see also **Zenith Vinyl Fabrics Corp. v. Ford Motor Co.**, 357 F. Supp. 133, 137 (E. D. Mich. 1973); **Peltier v. Humble Oil & Refining Co.**, 1973 Trade Cases ¶ 74,278 (D. Ore. 1972); **Calnetics Corp. v. Volkswagen of America, Inc.**, 348 F. Supp. 606, 620 (C. D. Cal. 1972); **Kirihara v. Bendix Corp.**, 306 F. Supp. 72, 90-91 (D. Hawaii 1969); and **Smith-Victor Corp. v. Sylvania Electric Products Inc.**, 242 F. Supp. 315, 320 (N. D. Ill. 1965).

unreasonable to anticipate that the ruling in the instant case will open the floodgates for treble damage suits and windfall verdicts every time an "acquisition" occurs, even though the acquisition has no actual anticompetitive consequences. We respectfully urge that this is a misuse of Sections 4 and 7 which should be arrested in its incipiency by this Court.

II.

The Holding by the Court of Appeals for the Third Circuit that a Competitor of an "Acquired" Business Can Get to the Jury on a Damage Claim Based on the Premise that the "Acquired" Business Would Have Failed and Disappeared From the Market in the Absence of the "Acquisition," States a Novel Legal Proposition Which Is Contrary to the "Failing Company" Doctrine and the Fundamental Principle that a Party Should Not Be Permitted to Maintain Mutually Contradictory Positions in the Same Lawsuit.

Section 7 of the Clayton Act was never intended to "impede . . . a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market." **Brown Shoe Co. v. United States**, 370 U. S. 294, 319 (1962). If an acquired company did not have the resources to be an effective competitor in the market, Section 7 is not violated by its acquisition. **United States v. General Dynamics Corp.**, 415 U. S. 486, 506-510 (1974).

Ever since **International Shoe Co. v. FTC**, 280 U. S. 291 (1930), it has been firmly established that an acquisition is immune from challenge under Section 7 where it is shown that the financial condition and resources of the acquired company were so dire that it faced the grave

possibility of business failure and there were no prospective purchasers other than the acquiring company. **See United States v. Diebold, Inc.,** 369 U. S. 654 (1962); **Citizen Publishing Co. v. United States,** 394 U. S. 131 (1969); **United States v. Greater Buffalo Press, Inc.,** 402 U. S. 549 (1971). In adopting this "failing company" doctrine, Congress [19] and the courts considered it more important to preserve the existence of a competitive entity than to eliminate the potential anticompetitive effects of the acquisition.

In dealing with the "failing company" doctrine as a defense, this Court has stated that "the burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." **Citizen Publishing Co. v. United States,** 394 U. S. at 138-139. But, surely, this rule as to the burden of proof should not be transformed into a weapon which enables a private plaintiff to recover on a damage claim which is premised in its entirety on the theory that, were it not for the "acquisition," the "acquired" company would have failed and gone out of business, nor should it be allowed to produce the wholly untenable result which would follow. Yet that is exactly what the Third Circuit has permitted to happen here.

Respondents' entire case was based on the premise that, had it not been for petitioner's "acquisitions," the "acquired" bowling centers would have gone out of business.[20] The "damages" which respondents proved consisted solely of the difference between what respondents'

19. Both Houses of Congress expressed an intention to preserve the failing company doctrine when Section 7 of the Clayton Act was amended in 1950. See **Brown Shoe,** 370 U. S. at 331.

20. As one of respondents' witnesses graphically put it "the assumption is that these centers would have fallen of their own economic weight if Brunswick didn't prop them up" (1297a-1298a).

bowling centers actually earned and what it was estimated these centers would have earned had the "acquired" centers gone out of business. The Court of Appeals specifically recognized this:

> ". . . It is . . . argued that Brunswick's presence in these markets was illegal and that plaintiffs suffered damages . . . because in the absence of that illegal presence the acquired centers would have gone out of business thus effectively transferring customers to Treadway's centers" (App. *infra,* pp. 9a-10a).
>
> "To meet this burden [of proving damages] the only evidence offered by plaintiffs was the expert opinions of several witnesses as to what profits the Treadway bowling centers would have made if Brunswick, instead of acquiring the centers, had permitted them to close" (App. *infra,* p. 24a).
>
> ". . . If the suit had been commenced at a time when the Court might have prevented the acquisitions by Brunswick or any other deep pocket owner, and if it had done so, one of two things might have happened. Brunswick might have allowed the bowling centers to close, and would thereby have eliminated any § 4 injury to plaintiff's property or business. Alternatively Brunswick might have found another purchaser whose presence in the market would have retained the same level of competition. The injury to Treadway's property or business at least on this record would have been the same, but there would have been no § 7 violation on which to predicate either a § 4 or a § 16 action. . ." (App. *infra,* p. 30a).

Thus, it was a necessary prerequisite to respondents' damage theory that the finder of fact first conclude that

the bowling centers in question would have failed and gone out of business had petitioner not "acquired" them. Indeed, in their own petition for certiorari, respondents insist that the record in this case establishes, beyond any possible cavil, that the "acquired" centers would, in fact, have gone out of business.[21] Respondents have made this assertion in order to nail down the factual premise for their "damage" claim, but in so doing respondents effectively have conceded everything which is necessary to entitle petitioner to judgment under the "failing company" doctrine. If the "acquired" bowling centers would have failed and gone out of business but for the "acquisitions", they were "failing companies" whose "acquisition" could not have violated Section 7. Contrariwise, if the "acquired" centers would not have gone out of business, respondents have shown no "damages" attributable to petitioner's alleged violations of Section 7. Either way, respondents' case must fail.

The Third Circuit held, however, that petitioner was not entitled to judgment of dismissal as a matter of law. According to that court, since the burden of establishing the failing company defense is on the defendant, a jury presumably could find that petitioner failed to carry its affirmative burden and, at the same time, could find that respondents had carried their burden of showing that the "acquired" centers would have gone out of business were it not for the "acquisitions" (App. *infra*, pp. 26a-27a). This makes no sense at all. The "acquired" centers either would have gone out of business (in which case there would be no Section 7 violation) or they would not have gone out of business (in which case no damages were shown). Respondents cannot have it both ways.

21. Petition for certiorari in **Treadway Companies, Inc. et al. v. Brunswick Corporation,** (October Term 1975, No. 75-770) pp. 13-14.

The paradox appears to stem from the Third Circuit's unreasoning obedience to this Court's pronouncement in the **Citizen Publishing Co.** case, *supra,* that "the burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." This Court should make it clear that the principle of the **Citizen Publishing Co.** case should not be used to defeat the fundamental principles (1) that the party who has the burden of proof on an issue is relieved of that burden where his adversary supplies the necessary proof,[22] and (2) that a litigant should not be permitted to maintain mutually contradictory positions in the same lawsuit.[23] To hold otherwise and to permit respondents to blow hot and cold on the same question of fact is offensive to basic concepts of fairness and forthrightness and, as here, makes

22. *See, e.g.,* **Bradford Audio Corp. v. Pious,** 392 F. 2d 67, 73 (2d Cir. 1968) ("The appellee may avail himself of the appellant's proof"); **Aetna Insurance Co. v. Taylor,** 86 F. 2d 225, 227 (5th Cir. 1936) ("The burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence"); **Van Sant v. American Express Co.,** 169 F. 2d 355, 365 (3d Cir. 1948). ("[A] party may be relieved of the burden imposed upon him by the fact that the necessary proof is introduced by his adversary"). See also **Carr v. National Discount Corp.,** 172 F. 2d 899, 903 (6th Cir. 1949).

23. See, *e.g.,* **Scarano v. Central R. Co.,** 203 F. 2d 510, 512-513 (3d Cir. 1973) (It "is sometimes said to be a general rule that 'a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits' "); **Diaz v. Southeastern Drilling Co.,** 324 F. Supp. 1, 7 (N. D. Tex. 1969) ("No rule is better settled than the one that: 'A party who assumes and successfully maintains a certain position in a judicial proceeding cannot thereafter adopt an inconsistent position if doing so would result in prejudice to his adversary"). See also **Davis v. Wakelee,** 156 U. S. 680, 689 (1895); **Jamison v. Garrett,** 205 F. 2d 15, 17 (D. C. Cir. 1953); **Lummus Co. v. Commonwealth Oil Refining Co.,** 280 F. 2d 915, 928 (1st Cir. 1960); **Roth v. McAllister Bros., Inc.,** 316 F. 2d 143, 145 (2d Cir. 1963). And see **Holcomb v. Aetna Life Insurance Co.,** 255 F. 2d 577 (10th Cir. 1958); **Jones v. Central of Georgia Ry. Co.,** 331 F. 2d 649 (5th Cir. 1964).

a mockery of the principles underlying the "failing company" doctrine.[24] The Court of Appeals should have ordered the entry of a judgment of dismissal as a matter of law.

III.

The Refusal by the Court of Appeals for the Third Circuit to Decide the "Commerce" Question in Petitioner's Favor and the Decision to Give Respondents a Second Chance to Prove This Essential Element of Their Case, Represents an Improper Approach for a Reviewing Court at Variance With the Approach Taken by This Court and Another Court of Appeals, and Reflects a Misconception of the Two-Fold "Commerce" Requirements of Section 7 of the Clayton Act.

As the Act makes clear and as the Court of Appeals expressly noted (App. *infra*, p. 15a), Section 7 of the Clayton Act applies only when a corporation "engaged in commerce" acquires the stock or assets of "another corporation engaged also in commerce." Affirming the grant of summary judgment to a defendant in a Government Section 7 case, this Court has recently held that "the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." **United States v.**

24. In its opinion, the Court of Appeals recognized that the undisputed evidence demonstrates that it was petitioner's policy to attempt to sell repossessed equipment in place to third parties and that petitioner would only takeover a center if no sale to third parties could be effected (App. *infra*, p. 8a). It is obvious that there were no prospective purchasers for the centers involved in this case and that there was no alternative to operation of these centers by petitioner.

American Building Maintenance Industries, 422 U. S. 271, 283 (1975). "To be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." *Ibid.* And in determining whether the acquired company was so "engaged," one must look to the activities of the acquired company "at the time of the acquisition and merger." *Ibid.*

Although the trial of the instant case lasted over two months, respondents made no showing whatsoever that any of the prior operators of the bowling centers "acquired" by petitioner was "engaged in commerce" as that term was construed in the **American Building Maintenance** case. With the exception of Belmont Lanes in Pueblo, Colorado (whose owner also operated one other bowling center in the same state), each of the six bowling centers "acquired" by petitioner had been operated by a business enterprise whose sole business was the operation of that particular bowling center.[25] There was no showing that any of these local bowling center operators was "directly engaged in the production, distribution or acquisition of goods or services in interstate commerce." Each bowling center merely provided bowling facilities used by patrons of the local community which it served and each center competed for bowling business only within the confines of a particular state. The operation of a bowling center, without more, is clearly a wholly intrastate activity which does not satisfy the interstate commerce requirements of the antitrust laws. **Lieberthal v. North Country Lanes, Inc.**, 332 F. 2d 269, 271 (2d Cir. 1964).

25. The slight factual variation with respect to the prior operator of Belmont Lanes makes no significant difference. The fact that a corporation operates two local businesses in the same state does not make it any more engaged in interstate commerce than if it operates only one such business.

Certainly the mere fact that the prior operators of the "acquired" bowling centers had initially outfitted the centers with equipment obtained from outside the state does not mean that they were "engaged in commerce" when petitioner "acquired" them some years later. Nor would obtaining some incidental supplies from outside the state convert these local intrastate businesses into businesses "engaged in [interstate] commerce". See **Lieberthal,** *supra.*

Respondents simply failed to show that the "acquired" companies were "engaged in commerce." And the Third Circuit seemed specifically to recognize this when it said (App. *infra,* pp. 15a-16a):

> ". . . had the district court granted a motion to dismiss at the close of the plaintiffs' case, on the ground that the new § 7 threshold had not been met, we might have been inclined to affirm that decision."

Yet, rather than order the district court to dismiss the action on the ground that the Section 7 threshold had not been met, the Court of Appeals decided to give respondents a second chance; it remanded the case to the district court for a new trial. This was altogether improper.[26] If

26. In attempting to justify its decision to remand, the Court of Appeals stated that this Court's decision in **American Building Maintenance** had espoused a "new § 7 threshold" (App. *infra,* p. 16a), and that **Transamerica Corp. v. Board of Governors,** 206 F. 2d 163, 166 (3d Cir.), *cert. denied* 346 U. S. 901 (1953), had established "the proposition" in the Third Circuit "that the Clayton Act § 7, like § § 1 and 2 of the Sherman Act, represented an exercise of Congress' full powers under the commerce clause" (App. *infra,* p. 15a).

We submit that the Court of Appeals was wrong on both counts. It is clear from this Court's opinion in **American Building Maintenance** that the Court did not think that it was formulating any new principle of law but was simply following **Federal Trade Commission v. Bunte Bros.,** 312 U. S. 349 (1941), and the consistent enforcement policy of the Federal Trade Commission and the Department of Justice, the two governmental agencies charged with enforcing Section 7. See 422 U. S. at 275-283.

The Court of Appeals for the Third Circuit had **not** held in **Transamerica** that the "in commerce" language of Section 7 represented an exercise of Congress' full powers under the commerce clause. Indeed, the question was not even before the court in that case; there it was found as a fact that the companies in question were engaged in interstate commerce. 206 F. 2d at 165. The issue the court was addressing in **Transamerica,** when it spoke of the reach of Section 7, was whether Section 7 applies to commercial banks. *Id.* at 166.

a plaintiff fails to put into evidence all the proof necessary to sustain a judgment in his favor, the case should be dismissed. The fact that the district court failed to dismiss the case should have no bearing on the matter. Whether the jursidictional "in commerce" threshold has been satisfied by the proof is not the kind of question which the district court is in a better position to determine than is the court of appeals. The question is one of law which can be resolved upon a review of the record. If the evidence is insufficient as a matter of law, the case should be dismissed.

The approach taken by the Court of Appeals for the Third Circuit in the instant case is in direct conflict with the approach of the Court of Appeals for the Eighth Circuit in **Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors,** 521 F. 2d 1343 (8th Cir. 1975). There the Eighth Circuit affirmed the dismissal of a private antitrust action for failure of the plaintiff to show a sufficient interstate nexus, notwithstanding the court's recognition that there was a possibility that, if given another chance, the plaintiff might show such a nexus under principles recently laid down by this Court in a case decided subsequent to the district court decision. The Eighth Circuit said (521 F. 2d at 1347 n. 3):

> ". . . where appellants were given ample opportunity to present evidence on the interstate nexus and

> afforded a full opportunity for discovery, we do not believe it would be appropriate for us to now remand this case to the district court for further proceedings."

See also **Gulf Oil Corp. v. Copp Paving Co.**, 419 U. S. 186 (1974), where this Court held that an antitrust plaintiff's failure to allege and prove an effect on interstate commerce required the entry of judgment for the defendant.

We submit that the approach taken by the Eighth Circuit in **Diversified** and this Court in **Gulf Oil** is the proper one for a reviewing court to follow and that the approach taken by the Third Circuit in the instant case is contrary to the fundamental principles that a case should not be remanded for the purpose of giving a party an opportunity to supply omissions in his evidence, **Glassman Construction Co. v. United States,** 421 F. 2d 212, 214 (4th Cir. 1970), that "every litigant is entitled to one fair trial, not two," *ibid,* and that "an appellate court must apply the law in effect at the time it renders its decision." **Thorpe v. Housing Authority,** 393 U. S. 268, 281 (1969). See also **Bradley v. Richmond School Board,** 416 U. S. 696, 711-716 (1974).

Moreover, in directing that the "engaged in commerce" question be relitigated in the instant case, the Third Circuit proceeded on the premise that, on a retrial, respondents may be able to adduce sufficient evidence of interstate "purchases of pins, pinsetter parts and perhaps other supplies" to show that the bowling centers taken over by petitioner "were engaged 'in the flow of interstate commerce' within the meaning of the new § 7 test" set forth in **United States v. American Building Maintenance Industries,** *supra* (App. *infra,* p. 16a). However, in premising the remand on this proposition, the Third Circuit overlooked the fact that Section 7 of the Clayton Act has not one, but two "commerce" tests. Not only must the

acquiring and acquired corporations be "engaged in commerce" but the anticompetitive effects of the challenged acquisition must be in a "line of commerce".[27] Proof of purchases of equipment and supplies in interstate commerce could not satisfy this second test. Since the Clayton Act defines "commerce" as interstate commerce,[28] a violation of Section 7 must rest upon a showing of **anticompetitive effects on interstate commerce.** Certainly that is what this Court has assumed to be the law. See **Gulf Oil Corp. v. Copp Paving Co.,** 419 U. S. 186 (1974), where this Court said (at pp. 201-202):

> ". . . §§ 3 and 7 of the Clayton Act . . . were intended to complement the Sherman Act and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices that promise, in their full growth, to impair competition in interstate commerce. . . .
>
> ". . . Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce, a court cannot presume that such effects exist. **The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods** in order to invoke federal antitrust prohibitions. . . ."

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27. Section 7 provides:

"No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or . . . assets of another corporation engaged also in commerce, where **in any line of commerce** in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

28. Section 1 of the Clayton Act, 15 U. S. C. § 12, says that "'commerce,' as used herein, means trade or commerce among the several states and with foreign nations," *i.e.,* interstate commerce.

As the Court of Appeals for the Ninth Circuit said in **Page v. Work**, 290 F. 2d 323, 333 (9th Cir.), *cert. denied* 368 U. S. 875 (1961):

> ". . . [I]t must be interstate commerce which feels the pinch, or competition in interstate commerce which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in interstate commerce, before the provisions of [Section 7] become applicable.
>
> ". . . [T]he language of Section [7] in no way indicates that Congress intended to apply the provisions of that Act to purely local activities wholly directed to a local intrastate market and relating to a product not in the flow of interstate commerce. . . ."

The Court of Appeals quite properly recognized in the instant case that respondents did not prove or attempt to prove that petitioner's "acquisitions" had any impact upon commerce in the manufacture or sale of bowling equipment and supplies (App. *infra*, p. 10a). Rather, the evidence introduced by respondents was geared to an attempt to demonstrate that petitioner's "acquisitions" of bowling centers in the Poughkeepsie, Pueblo and Paramus markets "created the possibility of substantially lessening horizontal retail competition and tended toward the creation of a retail monopoly" in those three local markets (App. *infra*, p. 11a). But this retail business was a purely local business, not a "line of [interstate] commerce." The business consisted of providing bowling facilities for patrons in a local geographical area.[29] There was no showing

29. In their complaint, respondents had alleged that "the effects of [petitioner's] acquisitions of the above-named bowling centers is and has been substantially to lessen competition or tend to create a monopoly" in three specified retail markets (23a), to wit "the entire metropolitan area of Pueblo, Colorado," "Bergen

that bowlers crossed state lines to come to bowling centers in the Poughkeepsie, Pueblo or Paramus markets or that any bowling centers in these areas solicited customers from across state lines. To the contrary, the evidence demonstrated that the bowling center business in each of these communities was, purely and simply, a local business.

Thus a new trial would be futile since even if it were shown that petitioner's predecessors in the operation of bowling centers "engaged in" interstate commerce when they purchased bowling equipment and supplies, that interstate commerce ceased when the equipment and supplies were delivered to the purchasers and did not extend into the purely local use which they made of the purchased goods. This Court held in **Schechter Corp. v. United States**, 295 U. S. 495, 543 (1935):

> ". . . The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition or use. . . ."

At most, there was a mere "nexus" between interstate commerce in bowling equipment and supplies and local competition in the operation of bowling centers—a nexus no stronger than that which this Court held in **Gulf Oil Corp. v. Copp Paving Co.**, *supra*, was insufficient to bring a local business into the stream of interstate commerce.

Why should petitioner, or indeed the district court, be burdened with an expensive retrial and relitigation of

29. (Cont'd.)

County, New Jersey and an area within a six-mile radius of" Paramus Bowl-O-Mat, and "Wappingers Falls, New York, Poughkeepsie, New York, and communities situated within ten to twenty miles of Wappingers Falls" (13a).

the "engaged in commerce" question when, whatever may be shown in the way of interstate purchases by the bowling centers which petitioner "acquired", respondents will be precluded by the nature of their case from showing that any of the "acquisitions" had an anticompetitive effect on a line of interstate commerce? In the words of this Court in **Gulf Oil Corp. v. Copp Paving Co.**, *supra*, "plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions." 419 U. S. at 202. It makes no sense to have the judicial system and the parties go through another protracted trial of the instant case when it is obvious that respondents have not made, and cannot make, any such showing. And, even if this were not so, under the authorities cited at p. 34, *supra*, respondents' time for offering such evidence has expired. The Court of Appeals should have ordered the district court to enter judgment for petitioner.

CONCLUSION.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-2127, 74-2128 and 75-1152

NBO INDUSTRIES TREADWAY COMPANIES, INC., NATIONAL BOWL-O-MAT CORPORATION, PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS, HOLIDAY BOWL-O-MAT, INC., SAGINAW BOWL-O-MAT, INC., PARADISE BOWL-O-MAT, INC., MUNCIE BOWL-O-MAT, INC., SKORE LANES BOWL-O-MAT, INC., MINNEAPOLIS BOWL-O-MAT, INC., DES MOINES BOWL-O-MAT, INC., and INDIANAPOLIS BOWL-O-MAT, INC.,

v.

BRUNSWICK CORPORATION, DANIEL LIEBLICH and REUBEN DANKOFF

BRUNSWICK CORPORATION, Appellant in No. 74-2127
PUEBLO BOWL-O-MAT, INC., HOLIDAY BOWL-O-MAT, INC., and BOWL-O-MAT PARAMUS OPERATIONS, Appellants in No. 74-2128
BRUNSWICK CORPORATION, Appellant in No. 75-1152

(D.C. Civil No. 595-66)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted on Briefs April 1, 1975
BEFORE STALEY, GIBBONS and WEIS, *Circuit Judges.*

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OPINION OF THE COURT

(Filed August 29, 1975)

GIBBONS, *Circuit Judge.*

I. INTRODUCTION

We have before us appeals and cross-appeals from a final judgment entered in a private antitrust case. The following determinations in the district court are being challenged: (1) the finding of a violation of § 7 of the Clayton Act, 15 U.S.C. § 18; (2) the correctness of the trial judge's calculation of attorney fees and costs; and (3) the

propriety of the trial judge's entry of a divestiture order in a private antitrust case.[1]

The complaint in this complicated litigation was filed on June 14, 1966 by Treadway Companies, Inc. (then known as National Bowl-O-Mat Corp.) and ten wholly-owned subsidiaries[2] through which it operated bowling centers throughout the United States. The plaintiffs charged Brunswick Corporation (Brunswick), a manufacturer and distributor of bowling equipment, with: (1) entering into resale price maintenance contracts in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (First Claim); (2) monopolizing and attempting to monopolize the business of operating bowling centers in various markets in which Treadway operated competing centers, thus violating § 2 of the Sherman Act, 15 U.S.C. § 2 (Second Claim); and (3) acquiring and operating bowling centers in the Poughkeepsie, New York, Pueblo, Colorado, and Paramus, New Jersey market areas which had the effect of substantially lessening competition or tending to create a monopoly in violation of § 7 of the Clayton Act, 15 U.S.C. § 18 (Third Claim). During a pre-trial conference held on March 6, 1973, the Sherman Act § 1 claim was abandoned. The § 2 Sherman Act claim and the § 7 Clayton Act claim went to trial. The jury returned a verdict in Brunswick's favor on the Sherman Act claim. No appeal has been taken from this determination. However, the jury found in favor of three of the plaintiffs— Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., and Bowl-O-Mat Paramus Operations—

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1. Many of the issues presented herein were before us in June 1974. We dismissed those appeals because they were taken from orders which were not final. NBO Indus. Treadway Cos. v. Brunswick Corp., 500 F.2d 1400 (3d Cir. 1974) (Nos. 74-1621, 1622); Appeal of Pueblo Bowl-O-Mat, Inc., 500 F.2d 1400 (3d Cir. 1974) (No. 74-1622); Treadway Cos. v. Brunswick Corp., 500 F.2d 1400 (3d Cir. 1974) (No. 73-2010).

2. These subsidiaries were: Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations, Holiday Bowl-O-Mat, Inc., Saginaw Bowl-O-Mat, Inc., Paradise Bowl-O-Mat, Inc., Muncie Bowl-O-Mat, Inc., Skore Lanes Bowl-O-Mat, Inc., Minneapolis Bowl-O-Mat, Inc., Des Moines Bowl-O-Mat, Inc., and Indianapolis Bowl-O-Mat, Inc.

on the § 7 Clayton Act claim. Damages were awarded in the following amounts:

(1) Pueblo Bowl-O-Mat, Inc., Pueblo, Colorado	$ 964,830
(2) Holiday Bowl-O-Mat, Inc., Poughkeepsie, New York	$ 298,800
(3) Bowl-O-Mat Paramus Operations, Paramus, New Jersey	$1,094,400

Pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, the district court trebled each of these awards, and on May 31, 1973 entered judgment on the damage claims for $7,074,090. As a result of Brunswick's post-trial motions, which were in all other respects denied, the district court granted a new trial as to Pueblo Bowl-O-Mat, Inc., unless Pueblo consented to a remittitur of $499,050. *Treadway Cos., Inc. v. Brunswick Corp.*, 364 F. Supp. 316, 326 (D. N.J. 1973) (decision on post-trial motions). Pueblo did consent, and on October 5, 1973 an order was entered reducing Pueblo's treble damage recovery to $2,395,440. Thus the total damage award was $6,575,040. The district court also considered plaintiffs' application for an award of costs and attorney fees. On April 2, 1974 judgment was entered in the district court awarding $428,468 as attorney fees, and $18,509.32 as costs. On September 24, 1974, after the appeals both by plaintiffs and Brunswick from this award were dismissed by this court,[3] the district court entered an order pursuant to Rule 54(b), Fed. R. Civ. P. directing the following: (1) that the May 31, 1973 judgment, and the October 5, 1973 and April 2, 1974 orders, be entered as final; (2) that the entries be made *nunc pro tunc* as of their original dates for the purpose of fixing the time from which interest at the legal rate would accrue; (3) that the entries be made as of September 24, 1974 for the purpose of taking any appeals. The district court re-

3. See note 1 *supra*.

tained jurisdiction over the claim for equitable relief pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26.

Brunswick appeals from the damage award of $6,575,040; from the award of attorney fees and costs; and from the district court's decision awarding interest from the time of the original judgment and order rather than from the time of the Rule 54(b) certification. Brunswick does not dispute the amount of the award of attorney fees and costs assuming the jury verdict is allowed to stand. It contends, however, that if the verdict is set aside the award of fees and costs must also be set aside. Treadway appeals from the calculation of the fee award contending that it was too low.

On November 15, 1974, the district court filed an opinion,[4] and on January 9, 1975 entered a final judgment, pursuant to § 16 of the Clayton Act, enjoining Brunswick from acquiring any existing bowling centers in the Pueblo, Paramus and Poughkeepsie/Wappingers Falls areas and ordering divestiture of centers previously acquired in those areas. Brunswick filed an appeal from this judgment. On February 14, 1975 this court entered an order directing that Brunswick's appeal from the injunction and divestiture judgment (No. 75-1152) be consolidated with Brunswick's other appeal (No. 74-2127) and with plaintiffs' cross-appeal (No. 74-2128).

Brunswick's contentions, listed below in the order in which they shall be considered, present these questions:

(A) *With respect to the jury verdict:*

(1) Does the record establish a prima facie violation of § 7 of the Clayton Act by Brunswick?

(2) Are treble damages pursuant to § 4 of the Clayton Act recoverable by litigants in the plaintiffs' positions solely for a violation of § 7 of the Clayton Act?

4. Treadway Cos. v. Brunswick Corp., 389 F. Supp. 996 (D. N.J. 1974).

(3) Did the court properly instruct the jury as to the elements of a Clayton Act § 7 case?

(4) Was the jury properly instructed on § 4 damages?

(B) *With respect to the injunction and divestiture order:*

(1) Was there evidence in the record sufficient to support the court's finding of a Clayton Act § 7 violation?

(2) Does § 16 of the Clayton Act authorize the entry of a divestiture order, at the insistence of a private litigant, to redress a violation of Clayton Act § 7?

Plaintiffs' main contention on their cross-appeal is that the criteria for fee awards laid down in *Lindy Brothers Builders, Inc. v. American Radiator & Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) and reiterated in *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), while properly applied by the district court, have no place in fully litigated antitrust actions. Rather, it is argued that these criteria should be applied only in class action settlements.

Virtually all of the issues before us are of first impression in this circuit and many are of first impression nationally. The antitrust questions arise because of the unique interaction among the Clayton Act § 7 which proscribes acquisitions having an effect which "*may* . . . substantially . . . lessen competition, or . . . tend to create a monopoly" and the private remedy provisions of § 4 and § 16 of the same act. A statutory prohibition aimed neither at existing conspiracies nor restraints, nor at existing or attempted monopolizations, but at incipient tendencies, presents problems of private enforcement not frequently encountered. Indeed this is perhaps the first case in which an award of money damages has been made to a private

plaintiff for an alleged violation of § 7. Thus the district court was exploring largely virgin antitrust territory. Certain errors were committed in this new territory which warrant a new trial. Reconsideration of the fee award will be required as well.

II. The Industry Background

Brunswick is one of the two largest manufacturers, distributors and financiers of bowling alley equipment in the United States. Its chief competitor is the American Machine and Foundry Company (AMF), a company about equal in size. Prior to 1964 Brunswick supplied the bowling recreation industry with large quantities of equipment such as lanes and automatic pinsetters. Since this equipment required a substantial capital investment Brunswick also financed the equipment on extended secured credit terms. In the early 1960's, however, the bowling recreation industry went into a sharp decline. The plaintiffs attribute this decline to overexpansion in the industry. They blame Brunswick for this overexpansion, claiming that it financed too many centers, and in particular, that it saturated certain areas with facilities so as to make competitive success impossible.

Simultaneously with the decline in the industry there occurred a collection problem. Defaults on equipment loans became commonplace. Numerous bowling center proprietors were in such hopeless financial straits that it became clear that there was no reasonable prospect of payment. Exercising its chattel security rights, Brunswick made numerous repossessions, and attempted to dispose of the repossessed equipment at discount prices. Such sales, however, did not keep pace with repossessions. Brunswick's efforts to lease repossessed lanes to new independent proprietors proved unsuccessful. Over the years Brunswick had borrowed close to $300 million in order to finance the manufacture and sale of bowling equipment. By late 1964 its receivables were in excess of

$400 million of which more than $100 million dollars were over 90 days delinquent. Brunswick was clearly in serious financial difficulty.

In an effort to reverse its deteriorating condition, Brunswick's management decided on a plan. In those cases in which attempts to collect receivables failed, it would repossess the equipment and attempt to sell it in place to third parties. If no sale could be effected Brunswick would then consider operating the failing centers itself if there appeared to be any reasonable prospect that a positive cash flow would result.

In January 1965 Brunswick formed a Bowling Center Operations Division (BCOD) charged with the responsibility of evaluating centers and operating those which could produce a positive cash flow. This development was disclosed by Brunswick's president to a meeting of the Bowling Proprietors Association, a retail level trade group, in 1965.

Between 1965 and 1972 BCOD evaluated over 600 defaulting centers for possible operation, commenced operating 222 of these, disposed of 11 to third parties, and closed 43 which proved unable to develop a positive cash flow. The highest number operated by Brunswick at any one time was 169. The largest number of centers taken over by Brunswick for operation in any year was 124 in 1965. Of these, centers in three areas are the subject of this appeal. They are Dutchess Lanes in Poughkeepsie, New York, Belmont Lanes in Pueblo, Colorado, and Fair Lawn Lanes, Interstate Lanes, Ten-Pin-on-the-Mall and Lodi Lanes in or near Paramus, New Jersey.

In each of the local retail market areas a Treadway subsidiary operated a bowling center competing for retail customers with the bowling centers taken over by Brunswick. The parties concede that each of these areas, Poughkeepsie, Pueblo, and Paramus, is a separate retail market for recreational bowling. Treadway does not manufacture or distribute bowling equipment or supplies.

The method used by Brunswick in taking over the operation of the six centers in issue was not identical. For our purposes, however, we can generalize. The acquisitions in question were by a major manufacturer of bowling equipment and supplies who took over bowling centers by means of stock or asset purchases. These newly-acquired facilities competed horizontally at the retail level with Treadway facilities and were kept in business by Brunswick when they otherwise would have failed.[5]

We can conclude our background survey of the bowling industry by noting that Brunswick now operates the largest number of retail bowling centers in the United States—167. The next largest retail bowling chain operates only 32 centers, and the rest of the retail market is fragmented among smaller chains and individual operators. It is conceded that the relevant market is local, however, not national. Brunswick's net assets far exceed the net assets of any other chain of bowling centers and it enjoys those additional advantages which accrue from being the manufacturer of the equipment used in its centers.

III. Summary of Plaintiffs' § 7 Theory

This case involves a "deep pocket" manufacturer's decision to integrate vertically forward into local retail markets and to compete with smaller competitors having shallower pockets. The jury verdict in favor of Brunswick on the Sherman Act § 2 claim establishes that this forward integration was not done in an attempt to monopolize the local retail bowling market. Plaintiffs contend, however, that the entry of such a competitor into these markets had the potential for lessening horizontal competition and that such potential lessening of competition suffices to establish a § 7 violation. It is therefore argued that Brunswick's

5. By contrast with Brunswick, although AMF undoubtedly suffered from the decline in the bowling recreation industry in the early 1960's it never integrated forward into the retail end of the business so as to be in competition with its actual or potential customers.

presence in these markets was illegal, and that plaintiffs suffered damages within the meaning of § 4. These damages were suffered, it is suggested, because in the absence of that illegal presence the acquired centers would have gone out of business thus effectively transferring customers to Treadway's centers.

IV. Was a Prima Facie Violation of § 7 Established?

A. *The potential effect on competition.*

This case does not present the classic § 7 problem of a merger with, or a purchase of assets from, a competitor on the same competitive level. Nevertheless, Brunswick's acquisitions had two aspects of possible significance for § 7 purposes. First, Brunswick was a major manufacturer integrating vertically forward into its customer market. Second, it was a giant entering local markets inhabited by pygmies. While both factors may have significance for purposes of § 7, in this case the first factor standing alone is not significant.

A major vice of vertical combinations is market foreclosure to competing manufacturers. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 323-24 (1962). But in the bowling industry there is only insubstantial continuous distribution from manufacturer to retailer. The principal products of the manufacturing end of the industry—pinsetters and alleys—are one-shot affairs, and the sales of these products by Brunswick had already taken place long before their reacquisition. It cannot be said, and it has not been shown, that AMF suffered or was likely to suffer any market foreclosure as a result of those reacquisitions. Moreover, Treadway is neither an actual nor a potential competitor at the manufacturing level, and hence is not a potential market foreclosure victim. Thus it probably lacks standing to assert the manufacturer's market foreclosure issue. In any event, manufacturer's market foreclosure is not the theory Treadway advances.

The second characteristic of the acquisition, however, is its potential effect on retail level competition. The entry of a giant into a market of pygmies certainly suggests the possibility of a lessening of horizontal retail competition. This is because such a new entrant has greater ease of entry into the market, can accomplish cost-savings by investing in new equipment, can resort to low or below cost sales to sustain itself against competition for a longer period, and can obtain more favorable credit terms. There is evidence from which the jury could have found that several of these factors applied to Brunswick's acquisitions in the Poughkeepsie, Paramus and Pueblo markets. Treadway urges that this evidence suffices to sustain the verdict that there was a § 7 violation. Brunswick, on the other hand, argues that there must be a showing of actual lessening of competition before the jury can find such a violation. We think, however, that Brunswick's argument confuses the showing which must be made to sustain recovery under § 4 with that which must be made to show a § 7 violation.

Three § 7 cases suggest that there was sufficient evidence here to go to the jury on the theory that Brunswick's entry into a local retail market both created the possibility of substantially lessening horizontal retail competition and tended toward the creation of a retail monopoly. Although these cases arose in three different merger contexts, they all involved the potential effect of mergers on horizontal competition.

Brown Shoe Co. v. United States, supra, involved a merger in which a major shoe manufacturer and retailer (Brown) acquired another retailer (Kinney). Thus, the merger had both vertical and horizontal aspects. First, the Court held that the vertical aspect of the merger—Brown's acquisition of a retailer—had potential market foreclosing effects for competing manufacturers and thus violated § 7. Second, the Court held that the Brown-Kinney combination had a potential for substantially lessening competition at the retail level. This conclusion was reached

even though Brown and Kinney, in combination, controlled but a small percentage of the retail shoe market, and even though Brown and Kinney had competed in only a small fraction of the geographic markets before the merger. It is true that since they did compete at retail, at least in a fraction of the geographic markets, the combination fits the classic § 7 pattern of a merger of competitors at the same level. But the significance of *Brown Shoe* lies less in that fact than in the Court's analysis of the probable effect of the merger on horizontal retail competition. Brown and Kinney in combination controlled only a small percentage of the retail shoe market. Yet, the Court declined to look at the mere quantitative substantiality of the resulting concentration. Instead it looked at qualitative substantiality. Among the qualitative factors which it mentioned were: (1) the fragmented nature of the retail industry; (2) the ability of a strong national chain to insulate selected outlets from the vagaries of local competition in selected locations; (3) the style leadership of the large chains and its effect on competitors' inventories; (4) the ability of an integrated manufacturer-retailer to eliminate wholesalers by increasing the volume of its retail purchases from its manufacturing division; and (5) the historical tendency toward concentration in the industry. 370 U.S. at 344-45. Finally, the court perceived in § 7 a congressional intention to protect small competitors even at the short run expense of consumers. It wrote:

> "[E]xpansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision." 370 U.S. at 344.

Of the major qualitative substantiality factors referred to in *Brown Shoe* there is evidence in this case tending to show that at least four may have been operative in the retail bowling recreation industry: a fragmented industry, the ability of a strong national chain to insulate itself from competitive vagaries in a local market Brunswick's promotional (style) leadership, and, after the debacle of the early 1960's, the tendency toward concentration. This is not to suggest that the evidence on any such factor was undisputed.

The qualitative substantiality approach of *Brown Shoe* pointed out rather clearly that although Brown and Kinney were retail competitors this factor was not of crucial significance for purposes of § 7. Many of the factors could result from the vertical integration of a pygmy into a giant in any wholesale or retail market. Shortly after *Brown Shoe* Chief Justice (then Judge) Burger so read the case. *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962). There a manufacturer of aluminum, Reynolds, acquired its customer, Arrow, a converter of aluminum into florist foil. The florist foil conversion industry was a line of commerce which consisted of approximately eight competitors who sold to 700 wholesale florist outlets. The District of Columbia Circuit refused to set aside an FTC order requiring divestiture. The court held, on the authority of *Brown Shoe*, that Arrow's assimilation into Reynolds' enormous capital structure and resources gave it an immediate advantage over its competitors. This advantage might have had the effect of substantially lessening competition or might have tended to create a monopoly.[6]

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6. Chief Justice (then Judge) Burger wrote:
"When Arrow was vertically integrated through the Reynolds' acquisition, one minor anti-competitive effect foreseeable was the exclusion of other manufacturers of raw foil (Reynolds' competitors) from selling to approximately 33% of the florist foil converting industry. However, neither the examiner nor the Commission rested their conclusions that Sec. 7 had been violated on this basis, nor should we. The truer picture of anti-competitive effect emerges from even the most cursory consideration of the post-acquisition competitive postures of the eight previously independent florist foil converters *vis a vis* one another. Arrow's assimilation into

In 1967 the Supreme Court made explicit what had been implicit in *Brown Shoe*—that a merger or acquisition fell within § 7 even though the acquiring corporation and the acquired one were not competitors and even though the transaction did not involve potential market foreclosure of suppliers. In *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967), it affirmed an FTC determination that Proctor & Gamble's acquisition of Clorox Chemical Company in a "product extension" merger violated § 7. Horizontal competition in the household bleach market was threatened, the Court concluded, because Clorox, already a dominant force in that market, would have the benefit of Proctor & Gamble's advertising discounts, retailing distribution network, and deep pocket. New entrants into the bleach market might be discouraged, active competition might be inhibited by fear of retaliation from so strong a force, below cost sales might be financed by Proctor & Gamble's deep pocket.

The marketing of household bleach is, of course, only remotely comparable to the marketing of recreational bowling. But the Court's analysis in *Proctor & Gamble* shows that Chief Justice Burger's reading of *Brown Shoe* was correct. In some industries the acquisition of a competitor by a deep pocket parent can have sufficient potential to harm horizontal competitors so as to violate § 7. There was sufficient evidence of such potential here to submit the case to the jury on the issue of effect on competitors.

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6. (Cont'd.)
Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the "deep pocket" or "rich parent" for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition. The Commission is not required to establish that the Reynolds' acquisition of Arrow did in fact have anti-competitive consequences. It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition. That such a potential emerged from the combination of Reynolds and Arrow was enough to bring it within Sec. 7." 309 F.2d at 229-30 (footnote omitted).

B. *The "in commerce" requirement.*

Section 7 applies when a corporation "engaged in commerce" acquires the stock or assets of "another corporation engaged also in commerce." At the time this case was tried, the Third Circuit was committed to the proposition that the Clayton Act § 7, like §§ 1 and 2 of the Sherman Act, represented an exercise of Congress' full powers under the commerce clause. In *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 166 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953), Judge Maris wrote that Congress, in enacting § 7, intended "to exercise its power under the commerce clause of the Constitution to the fullest extent."

Had the district court been possessed of perfect foresight, it would have foreseen a major development in § 7 law that was just over the horizon. In *United States v. American Building Maintenance Industries*, 43 U.S.L.W. 4838 (U.S. June 24, 1975), the Supreme Court considered the jurisdictional reach of § 7.[7] It concluded that unlike §§ 1 and 2 of the Sherman Act, § 7 did not encompass the whole of the commerce power. Effectively, *Transamerica Corp. v. Board of Governors, supra*, had been overruled. The Supreme Court wrote:

> "In sum, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act, as amended and reenacted in 1950, supports an expansion of the scope of § 7 beyond that defined by its express language. Accordingly, we hold that the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." 43 U.S.L.W. at 4842.

Applying this new standard to the record before us is a problem of no little difficulty. In fact, had the district court granted a motion to dismiss at the close of the plain-

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7. It had refused expressly to decide the question in Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974).

tiffs' case, on the ground that the new § 7 threshold had not been met, we might have been inclined to affirm that decision. There was, however, some evidence in the record to suggest that at least some of the acquired bowling centers may have made purchases of pins, pinsetter parts and perhaps other supplies, directly from Brunswick, rather than from local distributors. Thus, they arguably were engaged "in the flow of interstate commerce" within the meaning of the new § 7 test. We think it would be unjust, given the intervening change in the law, to find that the evidence presented was insufficient to cross the jurisdictional threshold and thus order that the district court dismiss the case. We think it more appropriate, consistent with the way in which we will ultimately dispose of the case, to have the "in commerce" question relitigated, with the plaintiffs' being given an opportunity to satisfy the new and more stringent jurisdictional test. See 28 U.S.C. § 2106.

V. Does § 4 Provide A Private Remedy For This § 7 Violation?

Until the Supreme Court read the first paragraph of § 7 disjunctively in the *du Pont* cases [8] so that it covered not only the horizontal acquisition of a competitor, but also acquisitions of non-competitors, the possibility of private recovery for a § 7 violation was remote. *Du Pont* involved a § 7 violation resulting from du Pont's acquisition of a 23% stock interest in General Motors, a company to which du Pont supplied paint and fabric. Subsequently, minority stockholders of General Motors brought a derivative action against du Pont seeking (1) § 4 damages from du Pont for the § 7 violation found in the government case, (2) damages for violations of §§ 1 and 2 of the Sherman Act, and (3) damages for a breach of a common law fiduciary duty. In an interlocutory decision, the district court held that since § 7 violations involved potential restraints or monopolizations such violations could not support recoveries under § 4 for injuries to business or property.[9] The case proceeded to trial on the Sherman Act and fiduciary duty claims and resulted in a judgment for du Pont.[10] On appeal from this final judgment the Second Circuit reversed the earlier interlocutory holding that a § 7 violation could not be the basis for a § 4 recovery. *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969). (*Gottesman I*). Judge Feinberg's opinion required, in effect, that the plaintiff show (1) a violation of § 7, (2) an actual injury causally connected to the violation, and (3) damages of a reasonably certain amount flowing from the causally connected injury. The § 7 violation in the *du Pont-General Motors* case was the potential market foreclosing effect of du Pont's 23% ownership of a large customer for automotive fabrics and finishes. The great significance of *Gottesman I* was that it did not hold that only those foreclosed from the General Motors market could recover. General Motors itself, which was not in the fabrics and finishes business, could recover as well. The Second Circuit remanded to the district court for a reconsideration of the evidence in the light of this interpretation of the interaction between § 7 and § 4.

On remand, the district court again held for du Pont.[11] When appealed, the Second Circuit, in an opinion by Judge Maris, affirmed. *Gottesman v. General Motors Corp.*, 436 F.2d 1205 (2d Cir.), *cert. denied* 403 U.S. 911 (1971) (*Gottesman II*). It is in this latter opinion that the Second Circuit fully considered the damage issue. Damages were not awarded because General Motors stockholders did not prove that the company paid a higher price to du Pont for fabric and finishes than was charged to other du Pont customers and did not prove that the materials in question could have been purchased on the open market, at lower

8. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957); *id.*, 366 U.S. 316 (1961).

9. Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D. N.Y. 1963), *leave to appeal denied*, (2d Cir. Jan. 31, 1964), *cert. denied*, 379 U.S. 882 (1964).

10. 279 F. Supp. 361 (S.D. N.Y. 1967).

11. 310 F. Supp. 1257 (S.D. N.Y. 1970).

prices, with equal quality and service. Plaintiffs did not prove, in other words, that General Motors' business or property had been injured.

Brunswick and Treadway attach diametrically opposed significance to *Gottesman I* and *II*. Brunswick's theory is that there can be a § 4 recovery only if there is an actual foreclosure of competitors or an actual lessening of competition which results in injury. That approach may work in a situation such as *du Pont-General Motors* where the § 7 violation depends upon the potential for market foreclosure. A party losing foreclosed sales might then recover lost profits, and the foreclosed customer such as General Motors, might recover overcharges. But when the § 7 violation depends upon the potential injury to a horizontal competitor at the same level as the acquired company, Brunswick's approach would virtually preclude recovery by the competitor until he has been driven out of business.

Brunswick also focuses on the "substantially to lessen competition" language of § 7 and urges that no recovery can be had when activity in the marketplace has the effect of preserving a competitor and reducing consumer prices. But to focus on short run beneficial effects on consumer prices is to disregard the disjunctive "or tend to create a monopoly" clause in § 7, and to confuse injury to the public with injury to competitors. The public is not injured while a potential monopolist is vigorously competing to achieve monopoly power, though that injury may come later. Competitors, on the other hand, are injured in their business or property in a short-run period of predatory competition. Brunswick would permit recovery only when there is an injury to competition (such as market foreclosure) and an injury to the competitor.

Treadway's theory differs from Brunswick's. It argues that if an acquisition is illegal under § 7 because it has a sufficient potential to injure competition or to tend to create a monopoly, then the mere presence of the violator in the market which in fact produces a causally linked injury

to the business or property of the competitor suffices for a § 4 recovery. To require more it urges, is to force a private plaintiff to prove a Sherman Act § 1 or § 2 violation and to eliminate private damage recoveries for § 7 violations.[12] Under Treadway's theory it can recover the profits on any sales which it lost by virtue of Brunswick's presence, or any sales which it would have gained in Brunswick's absence.

Treadway's interpretation of the interaction between § 7 and § 4 obviously has far-reaching ramifications. Nevertheless, we believe it to be more consistent with the purposes of § 7 to hold that illegal presence which causes injury to the business or property of a competitor is compensable under § 4. This is not to say that proof of a § 7 violation will permit every competitor of the acquired company to recover automatically. As can be seen from *Gottesman II*, the proof of causal connection and of damage still is formidable.

We hold, then, that a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition. In this case there was sufficient evidence to go to the jury on the fact of such injury, although as we indicate hereafter there are difficulties with the manner in which the issue was framed in the court's charge.

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12. In *Gottesman I* the Second Circuit wrote:

"The basis of the pre-trial ruling was that a section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. . . ." 414 F.2d at 961.

Referring to this language, two prominent commentators have noted:

"It becomes readily apparent that if the plaintiff has to establish that the threatened harm (probable restraint or monopolization) has ripened into reality, he, in effect, has the burden of establishing an actual restraint or actual monopolization. Thus, the practical effect might be to transform into an action based on §§ 1 and 2 of the Sherman Act a suit based on § 7 of the Clayton Act." Kintner & Wilberding, Enforcement of the Merger Laws By Private Party Litigation, 47 Ind. L.J. 293, 312 (1972).

VI. Did The Court Properly Charge A § 7 Violation?

A. *The impact on competition.*

In presenting the case to the jury the district court first charged on the Sherman Act § 2 aspects on which, as we pointed out above, there was a verdict for Brunswick. The court then turned to the § 7 count, explaining that there were three elements involved in determining whether Brunswick violated that section: (1) the relevant lines of commerce, (2) the relevant geographic markets, and (3) "the likely anticompetitive effects of the acquisition of bowling centers in the relevant local market." (4 App. at 2268a). The court then indicated that there were three relevant geographic markets for bowling center operations, and continued:

> "You must decide whether the effect of the acquisition of bowling centers by Brunswick may be substantially to lessen competition or tend to create a monopoly in that 'line of commerce' and 'section of the country.'
>
> The determination of this question will establish whether or not this acquisition was a violation of Section 7 of the Clayton Act.
>
> This determination must be made in light of several factors: the primary index of legality is the market share of the acquired and acquiring companies and the extent of concentration in the industry.
>
> An acquisition which produces a firm controlling an undue percentage of the relevant market and resulting in a significant increase in concentration is presumptively unlawful, unless the defendants can overcome this presumption by other evidence to establish the vigor of competition or affirmative justifications in support of the acquisition.
>
> While market shares are not determinative of legality of an acquisition, I instruct you that high market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7. Section 7 of the Clayton Act may be violated either by showing a reasonable probability of a substantial lessening of competition in the future or by showing a substantial lessening of competition which has already occurred." (4 App. at 2269a-70a).[13]

This charge, in the context of the acquisition of retail outlets in relatively small geographic markets, was virtually a directed verdict. Without highlighting other factors, it emphasized the market share held by Brunswick in each of the markets in question, after the acquisitions.

The charge was defective in a number of ways. It did not say, for example, that the jury must consider such factors as the relative financial strength of Brunswick,

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13. Referring later to specific acquisitions the court reiterated its emphasis on quantitative substantiality:

> "Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly may conclude that Brunswick by the acquisition of Belmont Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market." (4 App. at 2317a-18a).
>
> "Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Poughkeepsie area beyond an insubstantial amount, say beyond 10 to 15 per cent, may be sufficient for you to infer that competition has substantially been lessened.
>
> Consequently, you may properly conclude that Brunswick by the acquisition of Dutchess Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained more than 20 per cent of the Poughkeepsie, New York bowling center market." (4 App. at 2319a-20a).
>
> "Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Paramus area beyond an insubstantial amount, say beyond 10 to 15 per cent, may be sufficient for you to infer that competition has substantially been lessened.
>
> Consequently, you may properly conclude that Brunswick by the acquisition of Interstate, Fair Lawn, Ten Pin Lanes and Lodi Lanes violated Section 7 of the Clayton Act because Brunswick through those acquisitions obtained allegedly 39 per cent of the Paramus, New Jersey, bowling center market." (4 App. at 2320a-21a).

Treadway, and other competitors. This would have been significant, for although Brunswick was many times larger than Treadway, the latter was still a large public company, and in the bowling recreation industry there are practical limitations on the extent to which capital may be utilized for competitive advantage. Nor did the charge say that the jury must find that Brunswick's position as an equipment manufacturer or equipment financier gave it any retail market advantage.[14] Certainly if the vertical integration forward had this effect the jury could have found a tendency toward monopolization or the potential for a substantial lessening of competition. The jury also was not asked to take into account the historical tendency in the industry toward concentration or lack of such a tendency.

By emphasizing the quantitative substantiality of the market shares held by Brunswick, to the exclusion of other factors, the court failed to draw the jury's attention to the indicators of qualitative substantiality referred to in *Brown Shoe Co. v. United States, supra, Reynolds Metals Co. v. FTC, supra,* and *FTC v. Proctor & Gamble Co., supra.* While the quantitative substantiality of the market shares is important in a case involving a merger of horizontal competitors, it is far less important here because Brunswick was not previously in any of the three markets. Brunswick's entry into the picture did not increase concentration, but only acted as a substitution of competitors.

Treadway would have us overlook the deficiencies in the § 7 charge because extensive "deep pocket" evidence was introduced on the Sherman Act § 2 claim and the jury was instructed as to the relevancy of that evidence to that claim. There are two obstacles here. First, the court in its instructions quite clearly treated the two counts separately, and

14. As to Brunswick's position as a manufacturer and financier, the district court repeated the following charge with respect to each of the three markets in dispute:

"You may consider that Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers." (4 App. at 2317a, 2319a, 2320a).

we must assume that the jury understood as much. Second, because of the verdict in Brunswick's favor on the Sherman Act § 2 count we cannot speculate as to how the jury evaluated the "deep pocket" evidence.

Because the § 7 charge was inappropriate to the only theory upon which a § 7 violation could in the circumstances of this case be predicated, a new trial is required.

B. *The commerce requirement.*

The district court charged:

> "Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove . . . :
>
> First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce." (4 App. at 2342a).

Elsewhere, however, the court had charged:

> "The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area." (4 App. at 2317a).

It gave almost the identical instruction with respect to the Poughkeepsie acquisition. (4 App. at 2319a).

Brunswick contends (1) that the charge is internally inconsistent and (2) that the specific reference to the acquisitions being in a line of commerce amounted to a directed verdict on the interstate commerce issue. We think, however, that in the first quotation the court refers to the "engaged in commerce" requirement, while in the second, it refers to the "in any line of commerce in any section of the country" requirement. Certainly bowling centers are in a line of commerce in a section of the country, although

arguably they are only engaged in local rather than interstate commerce.

The interstate commerce charge is cryptic but we need not comment on it any further. When the case is retried, the district court will have to apply the new § 7 interstate commerce test laid down in *United States v. American Building Maintenance Industries, supra.* See Part IV B, *supra.*

VII. Was The Jury Properly Instructed On § 4 Damages?

We have already held that a horizontal competitor injured in its business or property by the presence in the market of a § 7 violator can recover under § 4. Treadway had the burden under § 4 of establishing the fact of such injury, the proximate causal relationship of that injury to Brunswick's presence in the market, and the amount of damage suffered.

To meet this burden the only evidence offered by plaintiffs was the expert opinions of several witnesses as to what profits the Treadway bowling centers would have made if Brunswick, instead of acquiring the centers, had permitted them to close.

The court charged:

> "Plaintiffs' witnesses Kenney, Mendelson, Davis, Lieblich and Gonzalez, all were qualified as expert witnesses. They were entitled to give their opinion as to profits which the plaintiff bowling centers would have made but for defendant's violations of law. These witnesses estimated the amount of business which would have come to plaintiffs' bowling centers if Brunswick had not operated a competitive center or had permitted it to close down in the normal course. . . .
>
> Although there was some differences in amount, these witnesses mutually corroborated each other both

> in the methods used in determining damages and in general estimates as to the extent of damages. I instruct you that if you believe any one of Messrs. Kenney, Mendelson, Davis, Lieblich and Gonzalez was telling the truth, then you must believe that all were telling the truth since they mutually corroborated each other and since there was no contradictory evidence offered by Brunswick as to extent of damages, except that the defendant denies that the plaintiffs are entitled to any damages.
>
> . . . You may disregard this testimony as to damages only if you find all these witnesses, Messrs. Kenney, Mendelson, Davis, Lieblich and Gonzalez, were discredited or impeached by contradictory evidence. I instruct you that if you find that the antitrust laws have been violated and that plaintiffs' corporations have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits, apart from any determination you may make as to those damages related to Fort Lauderdale and to plaintiffs' various interest expenses." (4 App. at 2326a-27a).

The court then reviewed the damage testimony. The thrust of this instruction, indeed the thrust of plaintiffs' § 4 theory, was that damages were to be computed by first assuming that each Brunswick-acquired center would have closed down at the moment of the takeover, but for the takeover and then by projecting what portion of the closed center's business would have been captured by Treadway's centers. However, since plaintiffs' § 7 theory was based on the presence of the violator, Brunswick, in the market, the jury should have been determining what plaintiffs' profits would have been if the violations had *never* occurred. In other words, the jury should have first been instructed to find whether the acquired centers would, in fact, have gone out of business, rather than being taken over by someone

else or continuing in business by extensions of credit. Such a finding was a prerequisite to establishing any proximate causal relationship between the § 7 violation and the only evidence of injury to business or property which was presented.

The inadequacy of the § 4 charge is brought into sharp relief by the court's instruction on the so-called "failing company" defense.[15] Since the jury rejected this defense with respect to each of the acquired centers, it must have concluded that none of the centers would inevitably have gone out of business. In the § 7 context the failing company defense was a matter on which the defendant Brunswick had the burden of proof. But in the § 4 context plaintiffs had the burden of proving an injury to their property or business proximately related to the violation. The effect of the damage charge was to relieve them of that burden and permit the jury to award damages on a theory which assumed an essential fact on which no finding was made.

The damage charge was defective in another respect. The court referred to the testimony of Treadway's witnesses estimating the amount of business which would have come to the Treadway Centers had the acquired centers closed down and to an exhibit recapitulating that testimony. Next it noted that Brunswick had not offered evidence on the damage question, and charged

> "I instruct you that if you find that the antitrust laws have been violated and that the plaintiffs' corporations

15. The court charged:

"A company is not a failing company merely because it is experiencing financial difficulties or temporary losses.

To qualify under the failing company doctrine, the resources of the acquired business must be so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure.

The 'failing company' defense, therefore, is a very restricted one. The acquiring company must show that the acquired company faced the grave probability of business failure, and that it was the only available buyer.

And it must show that there was no prospect for reorganizing the company which was acquired.

If some of the centers which Brunswick acquired were not failing, and if operators other than Brunswick could and would have acquired the centers in question, the doctrine does not apply." (4 App. at 2321a-22a).

> have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits. . . ." (4 App. at 2327a).

This was error, for it is clear that a trier of fact is at liberty within the bounds of reason to reject in whole or in part the uncontradicted testimony of a witness which does not convince the trier of its merit. This rule applies on the issue of damages as on any factual issue. *Rhoades Inc. v. United Air Lines, Inc.*, 340 F.2d 481, 485 (3d Cir. 1965).

Even if the § 7 charge had been entirely proper we would award a new trial because of the § 4 instruction.

Brunswick would have us hold that the jury's rejection of the failing company defense means that the only factual premise upon which plaintiffs' § 4 injury to property or business theory may be predicated has been decided against it, and that Brunswick should have judgment rather than a new trial. But the jury may only have decided that Brunswick had not established the defense by a preponderance of the evidence, and probably did not consider whether in order to find a § 4 injury it had to find that the acquired centers would have closed. Since there is evidence from which the jury might have found that the centers would have closed, a new trial with proper instructions is appropriate.

VIII. The § 16 Relief

A. *The district court's finding of a § 7 violation.*

Based upon the same evidence presented to the jury the district court concluded that the violation of § 7 warranted injunctive relief pursuant to the Clayton Act § 16. In doing so it rejected Brunswick's argument that the favorable verdict on the Sherman Act § 2 attempt to monopolize count established its beneficent intentions, and that no relief should be awarded on the assumption that the acquisitions might "tend to create a monopoly." It requested the court

to make specific findings of misconduct as a predicate for specific injunctive relief. To some extent the court did so, but it is clear that an essential predicate for the decision was that the jury verdict established Brunswick's unlawful presence in the market.[16] Since this is so, and since we are granting a new trial on the § 7—§ 4 aspects of the case, we conclude that the § 16 order must also be set aside. We are obliged, of course, to review the district court's findings of fact by a different standard. But with clear indications of the court's reliance on the jury's verdict, a verdict which we have concluded is tainted by erroneous legal instructions, we think the § 16 relief must also be reconsidered after a new trial.

B. *The divestiture order.*

Since we are granting a new trial the district court may again be asked to consider whether divestiture is a remedy available to a private plaintiff under § 16 of the Clayton Act. The authorities on that issue differ.[17] Until

16. The district court stated:

"In fashioning this remedy, I find it necessary to expressly state the factual basis on which I shall make my ruling. Although I have specifically made findings concerning the anti-competitive practices utilized by the defendant in causing the plaintiffs' injury, I also find in the alternative that the factual presence of the defendant in this market is sufficient to prompt the equitable intervention of this Court. In so finding, I adhere to the argument advanced by the plaintiffs that actual anti-competitive effects, let alone the causal mechanisms by which they were induced, are not necessary precedents to finding a violation of Clayton Section 7 nor to ordering equitable relief.

. . . The very fact of the jury's finding, unless it was so erroneous as to demand a judgment n.o.v. which I have previously denied, is sufficient to support my present decision to order injunctive relief." 389 F. Supp. at 1000-01.

17. Cases declining to grant a private divestiture remedy include: International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., No. 73-1513 (9th Cir. Apr. 25, 1975); Continental Sec. Co. v. Michigan Cent. R.R., 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927); American Commercial Barge Line Co. v. Eastern Gas & Fuel Associates, 204 F. Supp. 451 (S.D. Ohio 1962); Graves v. Cambria Steel Co., 298 F. 761 (S.D. N.Y. 1924) (L. Hand, J.); Venner v. Pennsylvania Steel Co., 250 F. 292 (D. N.J. 1918).

Cases suggesting the availability of a private divestiture remedy include: International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153, 1203-11 (D. Hawaii 1972) and Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606, 614-17 (C.D. Cal. 1972), both of which are

the Ninth Circuit's recent opinion in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, No. 73-1513 (9th Cir. Apr. 25, 1975), no court had made any real effort to analyze the problem in terms of congressional intention. The Ninth Circuit opinion makes an exhaustive analysis of the available legislative history and concludes, learned commentary to the contrary notwithstanding,[18] that Congress did not intend to create a private divestiture remedy when it enacted the injunctive relief provision of § 16.

No third Circuit opinion enlightens us on this problem. We have independently reviewed the available legislative history referred to in Judge Goodwin's extended opinion in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., supra.* We agree that it supports his conclusion that many members of the Senate and House Committees which considered the problem in the Sixty-third Congress assumed that § 16 did not create a private divestiture remedy. We will not burden this opinion with a repetition of Judge Goodwin's analysis.

It is quite another question whether legislative history from 1914, strong as it appears, should control the contemporary application of a statute laying down a fundamental national economic policy. This is especially true when the significance of the circumstances to which application is sought were perceived dimly, if at all, at the time of passage. The antitrust laws are of necessity statements of

17. (Cont'd.)

reversed on the issue by International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., *supra;* Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76 (N.D. Cal. 1972); Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120 (N.D. Cal. 1970); Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D. N.Y. 1965); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd per curiam*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

18. Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. 267 (1964).

general principle. They must be given meaning in specific applications on a case-by-case basis. It is impossible for a legislature to devise codes so all-encompassing as to predict every case to which the general principle should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy.

But we need not, in this case, decide a rule of general application with respect to the availability of divestiture relief under § 16. Even if such a private remedy is available, it would in our view be inappropriate because less drastic relief will provide sufficient redress.

It must be recalled that we are dealing with three specific geographic markets, and thus with three separate problems of relief. The focus of the remedy, then, must be on what can be accomplished to overcome the threat to competition in those specific markets. If the suit had been commenced at a time when the court might have prevented the acquisitions by Brunswick or any other deep pocket owner, and if it had done so, one of two things might have happened. Brunswick might have allowed the bowling centers to close, and would thereby have eliminated any § 4 injury to plaintiffs' property or business. Alternatively, Brunswick might have found another purchaser whose presence in the market would have retained the same level of competition. The injury to Treadway's property or business at least on this record would have been the same, but there would have been no § 7 violation on which to predicate either a § 4 or a § 16 action. At this late stage, ten years after the acquisition, divestiture of going, thriving bowling centers to other purchasers will not change the competitive picture. By now the formerly threatened businesses have survived.

An alternative to a sale, of course, would be to dismantle the centers. But at this time such a procedure would

merely reduce competition artificially in the three markets to the detriment of the public. If this had been a merger between competitors so that its effect would almost inevitably have been anticompetitive, divestiture, if authorized, might have been appropriate. But where the § 7 violation is by a new entrant purchasing an existing competitor in an existing market, relief should be restricted to preventing those practices by which a deep pocket market entrant harms competition. Otherwise what is intended as a shield for smaller competitors becomes a sword against the consumer. Given the type of § 7 violation which plaintiffs alleged and attempted to prove, divestiture was simply inappropriate.

IX. Attorney Fees And Costs

Since we are granting a new trial on the treble damage claim, the award of attorney fees and costs must also be set aside.[19] But since the district court may be faced with the question of attorney fees after a new trial, it is appropriate to consider plaintiffs' contention that the principles of *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra,* are applicable only to class actions and not to litigated antitrust cases. The district court properly understood the *Lindy Brothers* holding. It laid down principles of general application for the award of attorney fees. There is no exception for litigated antitrust cases. If a new award is made the court should be guided by the principles of *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra;* and *Merola v. Atlantic Richfield Co., supra.*

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19. DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1321 (3d Cir. 1975); Bryam Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649, 651 (3d Cir. 1967) (attorney fees not recoverable in absence of treble damage award).

CONCLUSION

The judgments appealed from in Nos. 74-2127 and 75-1152 will be reversed and the case remanded for further proceedings in accordance with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B

Opinion of the U.S. District Court for the District of New Jersey Dated September 17, 1973

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. A. No. 595-66

September 17, 1973

TREADWAY COMPANIES, INC., *et al.*,
Plaintiffs,

v.

BRUNSWICK CORPORATION,
Defendant.

Cole, Geaney & Yamner, Paterson, N. J., Law Firm of Malcolm A. Hoffmann, Malcolm A. Hoffmann, New York City, for plaintiffs.

Stryker, Tams & Dill, Arthur C. Dwyer, Newark, N. J., Mayer, Brown & Platt, Miles G. Seeley, Thomas B. McNeill, Chicago, Ill., for defendant.

OPINION

WHIPPLE, District Judge:

The trial of this case began for the second time on March 13, 1973 and concluded on May 11, 1973 with the following verdicts being returned:

1. In favor of defendant Brunswick and against plaintiffs Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus, Paradise Bowl-O-Mat, Inc., Treadway Companies, Inc. (for losses claimed to have been suffered by the closing of Fort Lauderdale Bowl-O-Mat, Inc.), Treadway Companies, Inc. (for losses claimed to have been suffered by interest charges) and Indianapolis Bowl-O-Mat, Inc., with respect to the claims of monopolization and/or attempted monopolization asserted by them, under 15 U.S.C. § 2.

2. On the so-called "acquisition claims" based on § 7 of the Clayton Act, against defendant Brunswick and in favor of the following plaintiffs in the following amounts: Holiday Bowl-O-Mat, Inc., $298,800, Bowl-O-Mat Paramus Operations, $1,094,400; Pueblo Bowl-O-Mat, Inc., $964,830.

On May 31, 1973, this Court, having previously trebled the amounts awarded to the plaintiffs on the Section 7 claims pursuant to 15 U.S.C. § 15, entered judgments reflecting the jury verdicts. Within ten days after the entry of said judgments, defendant brought the instant motion pursuant to Fed.R.Civ.P. 50(b) for a judgment notwithstanding the verdict or in the alternative for a new trial. A more detailed statement of facts is not presently necessary; where facts do become operative, the Court will set them out. The grounds for the motion are numerous and will be treated *seriatim*.

I

[1-4] Motions for a judgment notwithstanding verdict, since they are, by definition, "intrusions upon the province of the jury", must be granted cautiously and sparingly.

Rumsey v. Great Atlantic and Pacific Tea Company, 408 F.2d 89, 91 (3rd Cir. 1969). In ruling on the motion, the Court must review the evidence and all reasonable inferences in a light most favorable to the party who prevailed at the trial. Thomas v. E. J. Korvette, Inc., 476 F.2d 471, 474 (3d Cir. 1973); *Rumsey, supra,* at 90 of 408 F.2d; 5A J. Moore, Federal Practice ¶ 50.07[2]. In fact, it is the general rule that such a motion may only be granted where "reasonable minds could reach no other conclusion". Pope v. Holiday Inns, Inc., 464 F.2d 1303, 1306 (5th Cir. 1972); Sotell v. Maritime Overseas, Inc., 474 F.2d 794, 796 (2nd Cir. 1973); Reeves v. Power Tools, Inc., 474 F.2d 375, 380 (6th Cir. 1973). It is the further duty of this Court upon the instant motion to refrain from weighing the evidence and to ignore the credibility of the witnesses. Cole v. Chevron Chemical Co.—Oronite Division, 477 F.2d 361, 367 (5th Cir. 1973). It is upon these procedural guidelines that defendant's motion will be considered.

Defendant's initial argument is that its motion for a directed verdict at the close of plaintiffs' case was improperly denied as a matter of law. The first specific argument under this general heading is that the plaintiffs failed to present any evidence from which the jury could properly conclude that defendant's operation of competing bowling establishments gave rise to any reasonable probability that competition would be lessened or that a monopoly would tend to be created in violation of § 7 of the Clayton Act, 15 U.S.C. § 18.

The crux of the defendant's hypothesis is that the activity in which it engaged cannot be violative of § 7 as a matter of law because that activity had the effect of preserving competition rather than reducing it. Entwined in

this proposition are the defendant's subordinate contentions that (a) even if competition could be lessened or a monopoly created by their actions, damages could not, as a matter of law, flow therefrom, and (b) even if damages could flow as a matter of law, none were proven.

[5] The only purely legal issue implicit in this theorem, in this Court's view however, is whether a private party can, as a matter of law, recover damages for a § 7 violation. The conceptual difficulty inherent in this question is that the Act speaks in terms such as "*may* be to lessen competition, or to *tend* to create a monopoly". Thus, can a violation caused by a tendency result in damages? The question was laid to rest in Gottesman v. General Motors Corporation, 414 F.2d 956, 960-961 (2nd Cir. 1969), cert. denied, 403 U.S. 911, 91 S.Ct. 2208, 29 L.Ed.2d 689 (1970):

> We agree with those authorities cited above that indicate that a violation of Section 7 of the Clayton Act does furnish a basis for a claim for money damages under the broad language of Section 4 of the Act. . . . The basis of the pre-trial ruling was that a Section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages.

[6, 7] The legal issue of capacity being answered, the only remaining question is whether the plaintiff carried his burden of proof. As the court stated in *Gottesman*:

> If Section 7 is designed to prevent acquisitions that "may" or "tend to" cause specified harm, such an

> acquisition may either itself directly bring about the harm or make possible acts that do. We do not say that a Section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury "by reason of" the violation are persuasive propositions.

414 F.2d at 961. The question of whether the plaintiffs proved their damages as a proximate result of the defendant's activities is one for the fact-finder, *see* Dailey v. Quality School Plan, Inc., 427 F.2d 1080 (5th Cir. 1970). There was ample evidence adduced at the trial to show how Brunswick's entry into the retail market lessened competition, *see* Reynolds Metals Co. v. F. T. C., 114 U.S. App.D. C. 2, 309 F.2d 223 (1962); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966), and this Court views the matter as one where reasonable minds could reach *more* than one conclusion. The instant motion, therefore, cannot be granted on this ground.

The next point pressed by the defendant is that plaintiffs failed to prove that the competing bowling establishments acquired by Brunswick were engaged in interstate commerce as required by § 7. The authority with respect to § 7 is nonexistent, but there are cases dealing with bowling under other sections of the antitrust laws. This authority can, it seems to this Court, be employed in the instant case.

Defendant cites Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2nd Cir. 1964) as supportive of their position. The Court stated in its opinion of defendant's motion for a directed verdict, however, that *Lieberthal* is distinguishable from this case because the amount of interstate activity proven is greater than that alleged in *Lieberthal* and be-

cause the test enunciated in that case was the effect of the activity on interstate commerce.

[8] Additionally, and perhaps more importantly, the jury in this case was specifically instructed that the plaintiffs were required to "prove . . . [f]irst, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce." If the jury answers the above question in the affirmative, the jurisdictional issue is concluded, Washington State Bowling Proprietors Association v. Pacific Lanes, Inc., 356 F.2d 371, 380 (9th Cir.), cert. denied, 384 U.S. 963, 86 S.Ct. 1590, 16 L.Ed.2d 674 (1966); Bowl America, Inc. v. Fair Lanes, Inc., 299 F.Supp. 1080, 1090 (D.Md. 1969), except to the extent that this Court must examine whether the jury's conclusion was at all possible based on the evidence. As has been stated, there exists sufficient evidence to sustain such a conclusion. The instant motion cannot, therefore, be granted on this basis.

[9] On the same general issue, defendant argues that, as a matter of law, the jury could not have found that two of the establishments acquired by Brunswick, Fair Lanes and Interstate Lanes, were "engaged in commerce" at the time of the acquisition. This is allegedly so because Brunswick purchased the stock of these two companies after their parent company, American International Bowling Corporation (AIBC), had gone into bankruptcy.

As supportive of this contention, defendant cites Danning v. Brunswick Corporation, 466 F.2d 1010 (9th Cir., 1972), cert. denied, 409 U.S. 1126, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973). *Danning* was a consolidated suit by a trustee in bankruptcy and a shareholder of a competing bowling

center against Brunswick. Plaintiff alleged that Brunswick's assumption of the lease of the debtor violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act in that defendants "by their lease, conspired to foreclose acquistion of the [debtor] at the trustee's sale by anyone but Brunswick and enhanced Brunswick's monopoly in the bowling business." 466 F.2d at 1012 (footnote omitted).

In affirming the trial court's grant of summary judgment, the Ninth Circuit Court of Appeals stated:

> Plaintiffs' claims, as reflected in the complaints, are essentially similar; each is vested upon Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In substance the trustee and Levy contend that Malouf and Brunswick, by their lease, conspired to foreclose acquisition of the Matador business at the trustee's sale by anyone but Brunswick and enhanced Brunswick's monopoly in the bowling business.
>
> The basic defect in these contentions, briefly stated, lies in the fact that at the time of the sale the trustee had no business to sell. He had not seen fit nor taken the steps necessary to preserve the business as an integral unit, but had allowed the major components to revert to the creditor-owners.

466 F.2d at 1012 (footnotes omitted). Defendant asserts that the same reasoning applies to the instant case. This Court disagrees. The businesses which were sold in the instant case had been preserved as integral units. Mr. Lieblich testified at the trial that he and other bidders at the bankruptcy sale, assuming they had been successful, would simply have "assumed the debt obligations of [the bowling

centers involved] to Brunswick and have met them in the ordinary course of business." [Tr. 878-79]. Thus, it is clear from the testimony that the bidders at the bankruptcy sale in the instant case, unlike those in *Danning,* were purchasing going concerns which were in fact "engaged in commerce."

[10, 11] Defendant's next claim is that plaintiffs introduced no evidence whereby the jury could conclude that it acquired any assets of Belmont Lanes in Pueblo, Colorado or of Dutchess Lanes in Poughkeepsie, New York. Brunswick operated these centers under a lease agreement, defendant contends, and no other property was proven to have changed hands. The instant motion marks the first time that this issue has been raised and it might be plausibly argued that acquisition has been admitted.[1] Furthermore, the jury was instructed that they must find an acquisition in order to find a Section 7 violation; this they did. In this Court's view, that finding is supported by the record.

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[1] Brunswick made the folowing statement regarding Dutchess Lanes at paragraph 23 of its answer:

> . . . defendant entered into possession of the premises of said bowling center pursuant to a lease thereof, and of certain personal property located therein, by the owner of such premises, and at the same time defendant purchased from LEMAR, INC. certain liquor and food supplies and ball boring equipment located on such premises.

Concerning Belmont Lanes, Brunswick stated at paragraph 19 of its answer that it entered into an agreement with the former operator on the condition that "said former operator would turn over to defendant certain other equipment and supplies located in said center." Brunswick also stated in a memorandum dated May 5, 1973 that "Brunswick also bought the assets comprising Belmont Lanes in Pueblo", and that "Brunswick also purchased the assets comprising Dutchess Lanes in Poughkeepsie" (Br. at 10).

An admission by counsel is binding upon his client. *See* Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972); Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481, 484 (3d Cir. 1965).

Defendant's final argument on its motion for judgment notwithstanding verdict is that "evidence established as a matter of law that each of the [competing] corporations . . . was a failing company and that therefore any acquisitions of their assets or stock were beyond the reach of Section 7 of the Clayton Act." They argue that, because plaintiff's damage evidence was predicated on the fact that these centers would have gone out of business but for Brunswick's intervention, an admission has been made that the centers were in fact "failing companies". Much more is necessary however, for defendant's neat "Catch-22" proposition to be viable.

[12, 13] One asserting the failing company defense must establish not only that the particular company is in irreversible failure but also that the acquisition in question was the sole alternative available. United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555, 91 S.Ct. 1692, 29 L.Ed.2d 170 (1971). Whether the companies acquired by Brunswick were in fact failing is somewhat doubtful from the record. Furthermore, there is almost no proof as to the "sole alternative" requirement. A defense is a matter of proof for the defendant.

Brunswick also contends that it was the only bidder prepared to purchase all of the assets of AIBC and that that purchase was, therefore, the sole open alternative in order to save that corporation from failure as a matter of law. There were, however, several other bidders at the sale who were prepared to purchase individual establishments. There is no proof in the record, nor has Brunswick made any argument, as to why individual purchases would not present an additional alternative. Additionally, the jury re-

ceived sufficient instructions on the failing company defense [Tr. 4682-83; 4731-32] and found it inapplicable.

II

[14] Defendant's alternative motion is that a new trial should be granted. Such a motion is directed to the sound discretion of the trial court, Sotell v. Maritime Overseas, Inc., 474 F.2d 794, 796 (2nd Cir. 1973), and should only be granted where the verdict was influenced by partiality or prejudice, or some misconduct or some misconception of the law and the verdict established was therefore a clear instance of wrong decision and a resultant miscarriage of justice. Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 187 (8th Cir. 1972); Andrzejczak v. Calarco, 339 F.Supp. 68, 69 (W.D.Pa. 1972).

Several of the arguments marshalled in favor of the motion for a judgment notwithstanding verdict are restated in support of the motion for a new trial, this Court therefore considers its previous remarks sufficient to dispose of them. Included in this category are the following contentions: the Court erred in denying verdicts at the close of plaintiffs' case; the Court erred in denying defendant's motions for directed verdicts at the close of all the evidence; the verdicts are without foundation or support in the evidence; the verdicts are contrary to the manifest weight of the evidence.

[15] Defendant next argues that it was error for this Court to admit evidence illustrating the additional profits which would have been realized by the plaintiffs if the competing centers had not been acquired by Brunswick and had instead gone out of business. Defendant has cited no au-

thority, other than a cross-reference to a prior point, which would render such evidence inadmissible. Plaintiff correctly points out that an estimate of probable profits but for the alleged wrongdoing of a defendant is clearly admissible. William H. Rankin Co. v. Associated Bill Posters of the United States, 42 F.2d 152 (2nd Cir.), cert. denied, 282 U.S. 864, 51 S.Ct. 37, 75 L.Ed. 765 (1930). This being so, defendant's argument as to the admissibility of this evidence is reduced to a combination of a reargument of the viability of the plaintiffs' claims and a questioning of the evidence's weight. The Court has already decided the former and the latter is no ground for a new trial.

[16, 17] Defendant's next argument is that the Court's instruction that two of the acquisitions in question were, as a matter of law, "in a line of commerce" was error. Defendant asserts that such an instruction effectively took the issue of interstate commerce from the jury. Although this Court is convinced of the correctness of these charges, Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir.), cert. denied, 384 U.S. 963, 86 S.Ct. 1590, 16 L.Ed.2d 674 (1966); Bowl America, Inc. v. Fair Lanes, Inc., 299 F.Supp. 1080, 1090 (D. Md.1969), it is nevertheless arguable that they implied that the issue of *interstate* commerce was linked to the question of a line of commerce. It is textbook law, however, that a jury charge must be viewed in its entirety. James v. Continental Insurance Co., 424 F.2d 1064 (3d Cir. 1970); Ely v. Reading Co., 424 F.2d 758 (3d Cir. 1970). The jury in this case was specifically instructed as follows:

> Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove each and all of the following facts:

> First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce. . . .

Any possible confusion created by what was left unsaid was therefore eliminated by what was specifically stated.

[18] Defendant further contends that the Court's charges on what the jury might consider in deciding whether competition was lessened were erroneous as a matter of law. Specifically, Brunswick asserts that these charges were erroneous in that they (a) instructed the jury that they could consider the fact that "Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers", (b) instructed the jury that they could conclude that competition had been lessened in the particular areas from the fact that Brunswick acquired more than an insubstantial percentage of the particular market areas involved.

Defendant argues that its corporate size and the fact that it is a manufacturer of bowling supplies are completely irrelevant to the case. This Court disagrees. Corporate size and status as a manufacturer are crucial to the question of whether competition was lessened. Defendant clings to the position that it should be considered as just another competitor in the retail bowling business. The law is to the contrary. Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); Reynolds Metals Co. v. F. T. C., 114 U.S.App.D.C. 2, 309 F.2d 223, 229-30 (1962); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).

[19, 20] On the second point, it is admittedly true that occupation of a substantial portion of the acquired's market by the acquirer is not a per se antitrust violation. Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir. 1953), but a reasonable reading of the charge herein examined does not disclose such a suggestion. It is true, on the other hand, that the factors emphasized by the charge, and especially market percentage, are perhaps the most crucial considerations in Section 7 case. Brown Shoe Co. v. United States, *supra;* Sanitary Milk Products v. Bergjans, *supra;* United States v. Atlantic Richfield Co., 297 F.Supp. 1061 (S.D.N.Y.1969), aff'd sub nom., Bartlett v. United States, 401 U.S. 986, 91 S.Ct. 1233, 28 L.Ed.2d 527 (1971). The prerequisites for the granting of a motion for a new trial have not, therefore, been met by this contention.

[21] Defendant's last general objection relates to the Court's instructions as to damages. The initial specific argument, that plaintiffs could have suffered no damages because Brunswick could not, as a matter of law, have lessened competition by merely substituting itself for other bowling establishments, is merely the logical extension of the defendant's prior argument on the issue and has been sufficiently commented upon heretofore.

Defendant also claims that the Court erred in instructing the jury as to the monetary amounts of the damages claimed by the plaintiffs in that doing so had the effect of transforming opinion testimony into fact and directed the jury to find a specific amount.

[22, 23] Initially it should be noted that it is not error for the instructing Court to review the dollar amounts of

the damages proposed by both plaintiff and defendant. Dowell, Inc. v. Jowers, 166 F.2d 214 (5th Cir.), cert. denied, 334 U.S. 832, 68 S.Ct. 1346, 92 L.Ed. 1759 (1948); Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900 (D.Mass.1954). Reviewing the dollar amounts proposed by both sides was, of course, an impossible task in this case since defendant produced no damage evidence whatsoever. Defendant complains that the review of dollar amounts precluded the jury from considering several mitigating factors as to damages which were brought out on cross-examination. The jury, however, was repeatedly instructed that they were the sole judges of the facts. It would be most presumptuous of this Court to assume that they ignored anything and the charge, viewed in its entirety, certainly did not instruct them to do so. It was admittedly difficult to maintain proper balance in the damages portion of the charge, but the source of the difficulty is obvious. Counsel choose the manner in which a case is to be tried, the court instructs on the law as it interprets it and the evidence adduced at the trial.

[24] Defendant's final argument is that the Court erred in instructing the jury as follows:

> If you find that Brunswick acquired one of these local bowling centers with such an effect, then you must assess damages with respect to that local market in the same way I have previously described in connection with monopolization and attempted monopolization.

The Court agrees and further finds that the jury's award of damages was excessive as a matter of law and must be either reduced or the matter retried to prevent a miscarriage of justice.

The plaintiff in question is Pueblo Bowl-O-Mat in Pueblo, Colorado. On the theory of reduced profits due to Brunswick's incursion, damages as to Pueblo were claimed by plaintiff as follows:

Additional Annual Bowling Revenues		Net Income Per $1,000 Bowling Revenues		Per Year	Number of Years	Damages
$ 90,000 to $100,000	×	$1,109	=	$ 99,810 to $110,900	8/1/63 to 4/1/73 (9⅔)	$ 964,830 to $1,072,030

These computations, however, were offered to show damages for monopolization and/or attempted monopolization upon which claim the jury found for the defendants. As a matter of law, it was erroneous for the Court to instruct the jury to employ the same damage evidence with respect to the Section 7 claim because Brunswick did not acquire the competing establishment, Belmont Lanes, until April of 1965. Thus there could be no Section 7 damages for the 20 month period between August 1, 1963 and April 1, 1965, and the jury's award of $964,830 (the lower of the amounts claimed by plaintiffs) is erroneous.

Plaintiffs argue that the controlling proposition on this issue is whether there is any basis in the record for the finding which the jury actually made. In the normal situation, this would be a correct statement, but trial courts enjoy wide discretion in this area. Krall v. Crouch Brothers, Inc., 473 F.2d 717, 718-719 (8th Cir. 1973), and it would be naive of this Court to think that the jury, after being erroneously instructed, arrived at the correct Section 7 time period but coincidentally found damages in the exact dollar amount evidenced by the aforementioned incorrect time period. Thus, it is this Court's decision that plaintiffs either submit

to a remittitur on the damages of plaintiff Pueblo Bowl-O-Mat or retry the issue.

The one remaining question is the amount of the remittitur. Here too, quite predictably, there is disagreement. Defendant computes the remittitur as follows:

Jury Verdict Before Trebling		Number of Months 8/1/63 to 4/1/73		Per Month Damages		Number of Erroneous Months	
$964,830	÷	116	=	$8317.50	×	20 (corrected figure)	= $166,350
					×	3 (trebling)	= $499,050

Plaintiff argues that this formula assumes too much. Specifically, they argue that it would be unwarranted for this Court to assume that if the jury had known that they could not assess damages for the period from August 1, 1963 to April 1, 1965, they would still have chosen the lower estimate of damages for the period from April 1, 1965 to April 1, 1973. They argue that the Court should employ the higher estimate for the 96 month period for which damages could correctly have been allotted and compute the remittitur as follows:

Plaintiffs' High Damages Estimate		Number of Months 8/1/63 to 4/1/73		Per Month Damages		Number of Correct Months	
$1,072,030	÷	116	=	$9,241.64	×	96	=

Amount Jury Could HaveFound Based on Evidence	Difference Between What Jury Could Have Found and What They Did Find
$887,197 (corrected figure)	$964,830 — $887,197 = $77,633
	$77,633 × 3 (trebling) = $232,899

To compute the remittitur otherwise, argue plaintiffs, would be an unwarranted attempt to decipher the jury's intent. Further, they cite Gorzalitz v. Olin Mathieson Chem-

ical Corp., 429 F.2d 1033, 1047 (5th Cir. 1970) for the proposition that the Court may not substitute its own judgment for that of the jury. That statement is a correct one but of little assistance on the instant issue since it really begs the question.

The present function of this Court is to exercise its discretion and equitably correct the mistake committed. In its opinion, it would be more of an invasion of the jury's function to say that they would have computed yearly losses differently if they were aware of the correct time period. The final award was, after all, merely a function of what the jury found to be yearly losses times the number of years involved. In view of the foregoing, then, it is this Court's opinion that the amount of the remittitur should be $499,050.00. Pueblo Bowl-O-Mat's award would then be $2,395,440.00. Therefore, unless plaintiff Pueblo Bowl-O-Mat submits to a remittitur of $499,050.00, defendant Brunswick's motion for a new trial as to the damages of that plaintiff will be granted. Defendant's motions in all other respects are hereby denied.

Submit appropriate Orders.

APPENDIX C

Opinion of the U.S. District Court for the District of New Jersey Dated November 15, 1974

Civ. A. No. 595-66.

United States District Court
D. New Jesrey.

Nov. 15, 1974.

As Amended Nov. 25, 1974.

TREADWAY COMPANIES, INC., *et al.*,

Plaintiffs,

—v.—

BRUNSWICK CORPORATION,

Defendant.

Cole, Geaney & Yamner, Paterson, N. J., for plaintiffs; Malcolm A. Hoffmann, Robert C. Agee, Robert W. Biggar, Jr., and Bernard Zucker, New York City, of counsel.

Stryker, Tams & Dill, by William L. Dill, Jr., Newark, N. J., for defendant; Miles G. Seeley, Thomas B. McNeill, and Mayer, Brown & Platt, Chicago, Ill., of counsel.

OPINION AND ORDER

WHIPPLE, Chief Judge.

The parties appear before this Court after having concluded a nine and a half week trial before a jury at which

the defendant Brunswick was found to have violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The jury found no violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The plaintiffs were awarded damages by the jury in the amount of $2,358,030 before trebling and consented to a remittitur in the amount of $499,050 for the reasons set out in an opinion by this Court filed on September 17, 1973, Treadway Companies, Inc. v. Brunswick Corporation, 364 F.Supp. 316, 324-326 (D.N.J.1973). The relief presently sought by the plaintiffs is for an injunction pursuant to 15 U.S.C. § 16 and Fed.R.Civ.P. 65 ordering the defendant Brunswick to divest itself of Belmont Lanes, Pueblo, Colorado; Interstate Lanes, Ramsey, New Jersey; Fair Lawn Lanes, Fair Lawn, New Jersey; Ten-Pin-on-the-Mall, Paramus, New Jersey; and Lodi Lanes, Lodi, New Jersey.

In considering the propriety of this relief, the Court is mindful that the jury has already found injury and has awarded damages which, prior to Telex v. I. B. M., 367 F.Supp. 258 (N.D.Okl.1973), represented the largest outstanding, privately-litigated recovery under the antitrust laws of the United States. This Court is also reminded by the plaintiffs that, "[d]ivestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 330-331, 81 S.Ct. 1243, 1252, 6 L. Ed.2d 318 (1961).

[1] For its part the defendant resists this motion for injunctive relief. It contends that before this drastic remedy may be ordered, the Court must specifically find, pur-

suant to the requirements of Fed.R.Civ.P. 65, in what manner the defendant violated Section 7 of the Clayton Act and whether divestiture is, in fact, a remedy effectively directed toward ameliorating the injury found by the jury to have been suffered by the plaintiffs. The defendant further argues that the factual cause of plaintiffs' damages may not be found by the Court independent of and unassisted by the jury's finding on the record already submitted. At this stage of the proceeding, the Court is reminded by the defendant that it operates under the restraint of an estoppel by verdict wherein the Court's findings must at least be consistent with the jury's verdict if such findings were not analytically contained therein. Dixie Sand and Gravel Corp. v. Holland, 255 F.2d 304 (6th Cir. 1958). As a result the defendant vigorously emphasizes the fact that the jury found no liability on the Sherman Act charge of attempted monopolization. The defendant argues that this finding must necessarily influence the Court in its factual determination concerning the defendant's Clayton Act violation.

Section 7 of the Clayton Act reads:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or *to tend to create a monopoly*. 15 U.S.C. § 18 [emphasis supplied]

Since the jury previously found for the defendant on the Sherman Act charge of attempted monopolization, the defendant reasons that the italicized language above must now be removed from the Court's purview. Therefore, the defendant's violation of Section 7 must fall within the alternative language of the statute and reflect activities on its part which have resulted in a substantial lessening of competition. The defendant closes its argument by entreating the Court, as it makes its findings of fact pursuant to Fed.R.Civ.P. 65, to discover and reveal those specific acts of misconduct by which the defendant produced the substantial lessening of competition required by the statute.

[2-4] Although linguistically interesting and possessed of a certain persuasive allure, I conclude that the defendant's argument is legally deficient. It fails to recognize that the test for attempted monopolization under Section 2 of the Sherman Act involves, among other elements, the finding of a specific intent to monopolize. Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 73 S.Ct. 872, 97 L.Ed. 1277) 1953; Swift and Company v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905). No such finding of specific intent, however, is a necessary element for a conviction under the "tendency to create a monopoly" provision of Section 7 of the Clayton Act. As a result, the jury's Sherman Act determination does not preclude this Court from finding that its Clayton Act verdict was based upon a "tendency to create a monopoly." United States v. DuPont de Nemours & Co., et al, 353 U.S. 586, 607, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957); Crown Zellerbach Corporation v. F.T.C., 296 F.2d 800, 825 (9 Cir. 1961), cert. denied, 370 U.S. 937, 82 S.Ct. 1581, 8 L.Ed.2d 807 (1962). It is also established, ". . . the

legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act." Brown Shoe Co. v. United States, 370 U.S. 294, 328-329, 82 S.Ct. 1502, 1526, 8 L.Ed.2d 510 (1962). The decision by the jury on defendant's alleged violation of the Sherman Act goes no further than what it appears to be on its facts and thus it bears no logical relationship to the Court's present task of making factual findings on the defendant's violation of Section 7 of the Clayton Act.

In making the present findings this Court places primary reliance on Reynolds Metals Company v. F.T.C., 114 U.S. App.D.C. 2, 309 F.2d 223 (1962) and the authorities cited therein. The *Reynolds* case is analogous to the case at bar. It concerned a vertical merger by Reynolds, the world's largest manufacturer of raw aluminum foil, with Arrow Brands, a converter of raw aluminum foil into decorated forms sold almost exclusively to the florist trade. The Court found:

> Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the "deep-pocket" or "rich parent" for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximately cost or below and thus to undercut and ravage the less affluent competition. The Commission is not required to establish that the Reynolds' acquisition of Arrow did in fact have anti-

> competitive consequences. It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition. That such a potential emerged from the combination of Reynolds and Arrow was enough to bring it within Sec. 7. Reynolds Metal Company v. F.T.C., *supra,* 229-230 (1962).

Brunswick is a manufacturer of bowling equipment and its acquisition of these bowling lanes, which were potential and actual purchasers of its equipment, provided it with the opportunity of acting, like Reynolds, as a rich parent with a deep pocket. In Brunswick's case, however, the opportunity to tap the deep pocket did not prove merely to be a potentiality.

The history of the bowling industry and Brunswick's role in it is particularly illustrative on this point. Prior to Brunswick's entrance into the market of operating bowling centers, control of these businesses rested in the hands of single proprietors and a few small chains. One year after its entrance, however, Brunswick controlled 176 bowling centers in the United States and immediately became the industry's largest single operator controlling 5.5 times more centers than any of its competitors (Pl. Ex. 32)

Its growth in this area, however, did nothing to diminish its prominence as a major manufacturer of bowling equipment and, incident thereto, its position as a major creditor to the bowling centers which purchased its equipment. As a credit-extending parent it was able to subsidize the purchases of its newly-acquired business at the rate of $2,000.00 per lane, (Pl. Exs. 1, 1A, 2) while it placed the plaintiffs on a "cash only" basis although prior to entry in this market it customarily extended credit to these plaintiffs

(Pl.Ex. 35-38; Lieblich Tr. 598-601, 604-609, 617-628). Obviously the defendant utilized its position as a major supplier and creditor not only to nourish its own newly-acquired children but also to deprive its newly-found rivals.

This naturally jealous parent also sought to favor its newly-acquired businesses by endowing them with the allurements of give-away programs and special services as the Learn-to-Bowl series. The object was to attract and increase patronage of these bowling centers by individual bowlers and leagues. In this they were successful and drew patronage away from the plaintiffs. (Lieblich Tr. 290, 293-294, 321, 336-337, 389, 409-411, 873, 878-896, 899-901, 926-930; Kenny Tr. 1110-1111, 1126; Davis Tr. 1804-1812, 1818-1828, 1839-1843, 1869-1870; Mendelson Tr. 1243-1246, 1314, 1343-1346, Pl.Ex. 53). The deep pocket of the rich parent certainly contributed to the expenditures made on these programs.

It is obvious that the plaintiffs have suffered as a result of defendant's entry into the bowling center market. The jury also recognized the effect of this injury when it adopted plaintiffs' Exhibit 53 as its measure of damages on the Section 7 claims. This Court's own observations, coupled to the fact of the jury's own finding of injury on the Section 7 count, make it incumbent on me to fashion an equitable remedy to assure the nonrecurrence of such injury in the future. To act otherwise would have this Court violate the very doctrine of estoppel by verdict so vigorously advocated by the defendant both on oral argument and in its brief.

[5] In fashioning this remedy, I find it necessary to expressly state the factual basis on which I shall make my ruling. Although I have specifically made findings concern-

ing the anti-competitive practices utilized by the defendant in causing the plaintiffs' injury, I also find in the alternative that the factual presence of the defendant in this market is sufficient to prompt the equitable intervention of this Court. In so finding, I adhere to the argument advanced by the plaintiffs that actual anticompetitive effects, let alone the causal mechanisms by which they were induced, are not necessary precedents to finding a violation of Clayton Section 7 nor to ordering equitable relief.

[6, 7] The mere presence of a defendant in the market with the capacity or potentiality to substantially lessen competition is sufficient to trigger a violation of Section 7. Reynolds Metals Co. v. F.T.C., *supra,* at 229-230. In the instant case, however, not only does this defendant possess the *potentiality* to substantially lessen competition (because of its dual capacity as a manufacturer, creditor and supplier of bowling equipment as well as a purchaser of the same) but also the jury has already found the *actuality* of this anti-competitive effect when it assessed its award of damages in favor of the plaintiffs. The very fact of the jury's finding, unless it was so erroneous as to demand a judgment n.o. v. which I have previously denied, is sufficient to support my present decision to order injunctive relief.

The sufficiency of the jury's finding to support an injunctive decree of divestiture does not automatically resolve all the issues presented in the plaintiff's present application. Although it is permissible for divestiture to be ordered in the instant case, the question remains concerning its wisdom. The cases indicate, at times, a judicial reluctance to order so drastic a remedy in a private antitrust action. Schrader v. National Screen Service Corp., 1955 Trade Case, Par. 68,217 (E.D.Pa.1955); and at times

the courts seriously question whether such a right is available to private litigants under the antitrust laws. American Comm'l Barge Line Co. v. Eastern Gas. Assoc., 204 F.Supp. 451 (S.D.Ohio 1962).

[8] This Court's reading of Section 16 of the Clayton Act, however, does not find any congressional reluctance nor prohibition of affording the remedy to a private litigant. The language of the more recent cases in this area also supports this interpretation of the statute. "In the absence of solid precedent or clear legislative history, this court's own research into the availability of divestiture and mandatory injunction to a private plaintiff suing under § 16 has impelled this court to conclude that both such equitable remedies are available to private plaintiffs under § 16." International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 351 F.Supp. 1153. 1207 (D.Hawaii, 1972); Burkhead v. Phillips Petroleum Co., 308 F.Supp. 120, 127 (N.D.Cal. 1970). "The statute does not distinguish between types of injunctive relief. Any type would seem to be permissible, when it is appropriate. The . . . nature and extent of the remedy to be decreed . . . is a question for the trial court . . ." Julius M. Ames Co. v. Bostitch, Inc., 240 F.Supp. 521, 526 (S.D. N.Y., 1965).

[9] In ruling upon the appropriateness of the remedy the Court is influenced by a number of factors. Initially, it recognizes that private enforcement of the antitrust laws is encouraged both by Congress and the courts as an effective and efficient means of achieving governmental policy. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Hecht Co. v. Bowles, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed.

754 (1944). A second but no less central factor is the need to restore competitiveness in the market as well as the actual need for relief by the plaintiffs. "Like restitution it merely deprive the defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128, 68 S.Ct. 947, 957, 92 L.Ed. 1245 (1948). Finally, as was previously observed at the outset of this opinion, it is a remedy which, " . . . is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." United States v. E. I. duPont de Nemours & Co., *supra*.

[10] As applied to the facts in the instant case, it is apparent that the defendant's position in the bowling industry both as a supplier-purchaser and a creditor-borrower has infused it with the capacity to out-distance the efforts of its rivals because of the deep pocket of its manufacturing arm. Whether this deep pocket should or should not be utilized to finance give-aways and other promotional schemes or to subsidize or not to subsidize the purchase of newer and more attractive bowling equipment, it is clear that the opportunity for the abuse of this economic power is ever present. For the Court simply to enjoin these particular methods of doing busines would not prevent the defendant from possibly creating other means and practices by which the same anticompetitive effects could be produced in the market. In fact, it is this very anxiety about the versatility of an integrated giant and the multifarious ways by which it can abuse its econ-

omic power that has led this Court to refrain from basing its divestiture decree on narrow factual issues confined to those particular business practices that it has found to be anti-competitive in effect. The flexibility, afforded by the aggrandizement of economic power effected through the vertical merger in the instant case, is the actual danger that threatens both the bowling industry and these plaintiffs. This danger can effectively be removed only by rescinding the merger.

[11] Because the boundaries of this relief must be limited in extent to those zones of interest and actual harm properly represented by these plaintiffs, I shall order the defendant to divest itself of its bowling operations at Belmont Lanes, Pueblo, Colorado; Interstate Lanes, Ramsey, New Jersey; Fair Lawn Lanes, Fair Lawn, New Jersey; Ten-Pin-on-the-Mall, Paramus, New Jersey, and Lodi Lanes, Lodi, New Jersey.

The plaintiffs are to submit an appropriate order.